TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 396.

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, TRUSTEE, &c., PLAINTIFF IN ERROR,

vs.

FRANCIS P. GARVAN, AS ALIEN PROPERTY CUSTODIAN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED JUNE 14, 1920.

(27,758)

(27,753)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 396.

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, TRUSTEE, &c., PLAINTIFF IN ERROR,

vs.

FRANCIS P. GARVAN, AS ALIEN PROPERTY CUSTODIAN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Page.
Statement under Rule IV	1
Record from district court of the United States for the southern district of New York	3
Notice of appeal	3
Libel of information	5
Exhibit A—Schedule	10
Exhibit B—Schedule	11
Order directing seizure of securities by marshal	18
Monition	20
Marshal's return	23
Notice of claim	24
Answer	27

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 21, 1920.

Page.

Exhibit I—Deed of trust 36
Schedule "A" 46
Notice of motion for judgment on pleadings 7
Opinion 49
Final decree 51
Assignment of errors 54
Stipulation as to record 58
Clerk's certificate 59
Opinion 60
Decree 61
Petition for writ of error 61
Order allowing writ of error 63
Assignment of errors 64
Bond on writ of error 66
Clerk's certificate 68
Writ of error 69
Citation and service 70

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

FRANCIS P. GARVAN, as Alien Property Custodian,
Libelant-Appellee,

against

ONE HUNDRED THOUSAND DOLLARS par value Interborough Rapid Transit 5% Bonds maturing in 1966 and other property.

Statement Under Rule IV, Section 1, Subdivision 1.

This proceeding was commenced on the 7th day of July, 1919, by Francis P. Garvan, as Alien Property Custodian, by filing a libel of information praying the Court to enter an order directing the Marshal of the Southern District of New York to seize certain securities in the possession of Metropolitan Trust Company of City of New York. On or about the same date an order was made directing the said Marshal to seize and take into his possession the said securities. Thereafter, on July 7, 1919, monition was issued. On July 29, 1919, the Marshal's return was filed.

The Metropolitan Trust Company of the City of New York, as trustee of the trust under a certain indenture, filed a claim to said securities on the

4 *Statement Under Rule IV.*

28th day of July, 1919. On August 25th, 1919, the Metropolitan Trust Company of the City of New York, as trustee under the trust of said indenture, filed its answer. On the 17th day of October, 1919, the libelant applied to the United States District Court for judgment on the pleadings.

On November 6th, 1919, Honorable John C. Knox handed down his opinion, granting such application. On November 21st, 1919, the final decree was entered awarding possession. On November 29th, 1919, the claimant, the Metropolitan Trust Com-
5 pany of the City of New York, filed and served the notice of appeal from said decree to this Court.

6

Notice of Appeal. 7

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

FRANCIS P. GARVAN, as Alien Property Custodian, Libelant and Appellee, against ONE HUNDRED THOUSAND DOLLARS par value Interborough Rapid Transit 5% Bonds maturing in 1966 and other property.	Notice of Appeal. 69/211. 8

Sirs:

Please take notice that the claimant herein, Metropolitan Trust Company of the City of New York, Trustee under a certain Indenture of Trust made the 23rd day of March, in the year One thousand eight hundred and ninety-one, between the Mannheim Insurance Company of Mannheim, Germany, party of the first part, and Atlantic Trust Company of the City of New York, party of the second part, and the instruments supplemental thereto, hereby appeals to the United States Cir- 9

10 *Notice of Appeal.*

cuit Court of Appeals for the Second Circuit from the final decree entered herein on the 21st day of November, 1919.

Dated New York, November 25, 1919.

CARTER, LEDYARD & MILBURN,
Proctors for Claimant,
Metropolitan Trust Company
of the City of New York,
Office and P. O. Address,
54 Wall Street,
Borough of Manhattan,
11 New York City.

To FRANCIS G. CAFFEY, Esq.,
United States Attorney,
Proctor for Libelant and Appellee,
United States Post Office Building,
Borough of Manhattan,
New York City, N. Y.

ALEXANDER J. GILCHRIST, Esq.,
Clerk of the United States District Court,
Southern District of New York,
United States Post Office Building,
Borough of Manhattan,
12 New York City, N. Y.

Libel of Information. 13

IN THE DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

FRANCIS P. GARVAN, as Alien Property Custodian,
Libellant,

vs.

$100,000 Par Value Interboro Rapid Transit 5% Bonds, maturing in 1966, and other property. 14

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

Francis P. Garvan, as Alien Property Custodian, brings this proceeding, being in the nature of a libel of information, against the following described property, to wit: $100,000 par value Interboro Rapid Transit 5% bonds, maturing in 1966, and other bonds, a list of which is annexed hereto as Exhibit A, and says: 15

I.

That your petitioner is the Alien Property Custodian of the United States, duly appointed, qualified and acting as such on and since March 4, 1919,

16 *Libel of Information.*

pursuant to the provisions of the Act of Congress approved October 6, 1917, known as the "Trading with the Enemy Act," and the amendments thereto, and the executive orders and proclamations issued thereunder; and that your petitioner on said 4th day of March, 1919, succeeded A. Mitchell Palmer, who had previously been duly appointed, qualified and acting as such Alien Property Custodian, and who resigned such office on said 4th day of March, 1919.

17 II.

That your petitioner acting as such Alien Property Custodian, pursuant to the authority vested in him as such official, did heretofore, on, to wit: April 15, 1919, after investigation, determine that the Mannheim Insurance Company, whose principal home office and address is Mannheim, Germany, was an enemy not holding a license granted by the President within the purview of said Act, proclamations and executive orders; and that the following described property, to wit:

> $100,000 par value Interboro Rapid Transit 5% bonds, maturing in 1966, and other prop-
> 18 erty, more particularly described and listed in Schedule attached hereto as Exhibit A, and made a part hereof as fully as though written herein,

belonged to and was held for, by, on account of, and for the benefit of, said Mannheim Insurance Company.

III.

That on, to wit: April 15, 1919, subsequent to said investigation and determination, as aforesaid, your petitioner as such Alien Property Custodian, and by virtue of the authority vested in him as such official, did require of Metropolitan Trust Company, a New York corporation, in whose possession or under whose control said property then was, that said property be by it transferred, assigned, delivered, and paid over to your petitioner as such Alien Property Custodian, to be by him held, administered and accounted for as provided by law.

IV.

That said requirement and demand was duly served upon said Metropolitan Trust Company on, to wit: April 17, 1919; and a true and correct copy thereof, as served upon said company, marked Exhibit B, is attached hereto and made a part hereof.

V.

That said requirement and demand has not been complied with in so far as concerns the said property set forth and described in the Schedule hereto attached and marked Exhibit "A," and that said property at the present time is in the custody, or under the control of, said Metropolitan Trust Company, within the Southern District of New York, and within the jurisdiction of this Court.

22 *Libel of Information.*

VI.

That for a statement of grounds upon which the jurisdiction of this Court depends, your petitioner says that this is a proceeding in the nature of a libel of information, brought under Section 17 of said "Trading with the Enemy Act," as amended, by virtue of which this Court has jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of said Act.

23

VII.

That all and singular the premises are true and within the jurisdiction of this Court.

Wherefore, your petitioner prays that this Court make and enter an order directing the Marshal of the Southern District of New York forthwith to seize and take possession of the said money and other property described above in Paragraph V hereof, and hold the same until further order of this Court; and that this Court make and enter an order requiring and citing all persons having or pretending to have any claim to the possession of

24 said money or other property above described, to appear at a time and place to be fixed in said order, then and there to show cause, if any they have, why the possession of said money and other property should not be delivered by the Marshal to your petitioner to be by your petitioner held, administered and accounted for as Alien Property Custodian in accordance with the provisions of said "Trading with the Enemy Act" as amended, and the execu-

tive orders and proclamations issued thereunder; and your petitioner prays for all other relief to which in the premises he may be entitled and for all orders and decrees necessary to secure for your petitioner such relief.

FRANCIS P. GARVAN,
As Alien Property Custodian.
FRANCIS G. CAFFEY,
United States Attorney,
Proctor for Libellant.

District of Columbia, }
City of Washington, } ss.:

Francis P. Garvan, being duly sworn, says on oath that he is the Alien Property Custodian of the United States and the libellant in the above-entitled proceeding; that he has read the foregoing libel and knows the contents thereof, and that the same are true except as to such portions as are alleged on information and belief and as to these is informed and believes the same to be true.

FRANCIS P. GARVAN.

Subscribed and sworn to before me }
this 30th day of June, 1919. }
ODEN B. GRAY,
(Seal) Notary Public.
My Commission expires Oct. 13, 1920.

28

SCHEDULE.

Exhibit A.

Interboro Rapid Transit, 5%, 1966....	$100,000
Baltimore & Ohio Prior Lien, 3½%, 1925	50,000
Carolina Clinchfield & Ohio Railroad, 5%, 1938.....	25,000
Chesapeake & Ohio Railway Company General Mtg. Gold Bond, 4½%, 1992	50,000
Erie & Jersey 1st, 6%, 1955	75,000
Louisville & Nashville, 4%, 1940 (R. R. Unified)	25,000
29 New Amsterdam Gas Co. 1st. Cons. Mtg. Bonds, 5%, 1948.....	50,000
New York City Corporate Stock, 4½%, 1930-1960	100,000
New York City Corporate Stock, 4½%, 1930-1960	2,000
South and North Alabama Consolidated Mtg. Gold Bonds, 5%, 1963.....	40,000
Southern Pacific San Francisco Terminal 1st. Mtg., 4%, 1950.....	100,000
Toledo & Ohio Central Railway Company West Division Gold Bonds, 5%, 1935	50,000
Chesapeake & Ohio Big Sandy 1st. Mtg. Gold Bonds, 4%, 1944.....	2,000
30 Chesapeake & Ohio Big Sandy Railway Co. 1st. Mtg. Gold Bonds, 4%, 1944	1,000
Chesapeake & Ohio Big Sandy 1st. Mtg. Gold Coupons, 4%, 1944.....	1,000
Chesapeake & Ohio Big Sandy Railway Co. 1st. Mtg. Gold Bonds, 4%, 1944.	1,000
Chicago, Burlington & Quincy Railroad Co., General Mtg. Bond, 4%, 1958.	1,000

Exhibit B.

Chicago, Burlington & Quincy Joint, 4%, 1921	30,000	31
West Virginia & Pittsburgh R. R. Co. 1st Mtg. Gold Bonds, 4%, 1990	100,000	
Cleveland, Cincinnati, Chicago & St. Louis Railway Company, 1st. Mtg. Gold Bonds, 4%, 1939	50,000	
Colorado & Southern Railway Co. Refunding Extension Gold Bonds, 4½%, 1935	50,000	
Union Pacific Railroad 1st Ry. & Land Grant, 4%, 1947	100,000	32

Exhibit B.

ALIEN PROPERTY CUSTODIAN.

Demand for Property.

To Metropolitan Trust Company,
New York City.

I, Francis P. Garvan, Alien Property Custodian, duly appointed, qualified and acting under the provisions of the Act of Congress known as the "Trading with the Enemy Act" approved October 6, 1917, and the amendments thereto, and the Proclamations and Executive Orders issued pursuant thereto, after investigation, have determined heretofore and do 33

34 *Exhibit B.*

hereby determine that the following property, to wit:—

All of that property particularly described, itemized and listed upon and by schedule attached hereto, marked Exhibit A, each page of which is identified by the signature Thos. H. Phillips on the margin thereof.

Belongs to and is by you held for, by, on account of and for the benefit of the MANNHEIM INSURANCE COMPANY, which Company (whose principal Home Office and address is Mannheim, Germany) I, as
35 such Alien Property Custodian, after investigation have determined heretofore and do determine hereby to be an enemy not holding a license granted by the President within the purview of said Act, Proclamations and Executive Orders.

As such Alien Property Custodian I do seize such property and do require of you that the said property shall be transferred, assigned, delivered and paid over to me as Alien Property Custodian to be by me sold, administered and accounted for as provided by law.

You are further authorized and directed to make the delivery and payment of such property to the
36 New York Trust Company of New York City (or to its order) as Liquidator and Depositary for me under and by virtue of power and authority granted heretofore to said New York Trust Company.

This demand is supplementary to that certain demand with respect to the above described prop-

Exhibit B. 37

erty heretofore issued by me on the 18th day of November, 1918.

Witness my hand and seal of office this 15th day of April, 1919.

(Sgd.) FRANCIS P. GARVAN,
Alien Property Custodian.

Witness:

(Sgd.) J. A. LODER

(Seal of the Alien
Property Custodian)

38

Referred for signature
Division of Insurance

THOS. H. PHILLIPS
For Chief.

Approved
Bureau of Law

FRANCIS GOERTNER
4/15/19

SCHEDULE.

39

Trust Deed A/C No. 1.

Interboro Rapid Transit, 5%, 1966.....	$100,000
Baltimore & Ohio Prior Lien, 3½%, 1925	50,000
Carolina Clinchfield & Ohio Railroad, 5%, 1938.....	25,000
Chesapeake & Ohio Railway Company General Mtg. Gold Bond, 4½%, 1992	50,000
Erie & Jersey 1st, 6%, 1955.....	75,000

Exhibit B.

Louisville & Nashville, 4%, 1940 (R. R. Unified)	25,000
New Amsterdam Gas Co. 1st Mtg. Bonds, 5%, 1948	50,000
New York City Corporate Stock, 4¼%, 1930-1960	100,000
New York City Corporate Stock, 4¼%, 1930-1960	2,000
South and North Alabama Consolidated Mt. Gold Bonds, 5%, 1963	40,000
Southern Pacific San Francisco Terminal 1st Mtg. 4%, 1950	100,000
Toledo & Ohio Central Railway Company West Division Gold Bonds, 5%, 1935	50,000
Chesapeake & Ohio Big Sandy 1st Mtg. Gold Bonds, 4%, 1944	2,000
Chesapeake & Ohio Big Sandy Railway Co. 1st Mtg. Gold Bonds, 4%, 1944	1,000
Chesapeake & Ohio Big Sandy 1st Mtg. Gold Coupons, 4%, 1944	1,000
Chesapeake & Ohio Big Sandy Railway Co. 1st Mtg. Gold Bonds, 4%, 1944	1,000
Chicago, Burlington & Quincy Railroad Co., General Mtg. Bond, 4%, 1958	1,000
Chicago, Burlington & Quincy Joint, 4%, 1921	30,000
Chicago, Burlington & Quincy, Denver Division Extension, 4%, 1922	13,000
Cleveland, Cincinnati, Chicago & St. Louis Railway Company 1st Mtg. Gold Bonds, 4%, 1939	50,000
Colorado & Southern Railway Co. Refunding Extension Gold Bonds, 4½%, 1935	50,000

Exhibit B. 43

Union Pacific Railroad 1st Ry. & Land Grant, 4%, 1947	100,000
West Virginia & Pittsburgh R. R. Co. 1st Mtg. Gold Bonds, 4%, 1990	100,000

(Sgd.) Thos. H. Phillips

Trust Fund A/C No. 2.

Baltimore & Ohio Railroad, Secured Gold Bonds, Series B, 5%, 1919	$13,000
Baltimore & Ohio Railroad Co. Southwestern Division, 1st Mtg. Gold Bonds, 3½%, 1925	5,000
Baltimore & Ohio Railroad Co. Southwestern Division, 1st Mtg., 3½%, 1925	10,000
Central Leather 1st Lien Gold Bonds, 5%, 1925	1,000
Central Leather Company 1st Lien Gold Bonds, 5%, 1925	24,000
Chesapeake & Ohio 1st Mtg. Bonds, Greenbrier Division, 4%, 1940	50,000
Denver & Rio Grande 1st Consolidated Gold Bonds, 4%, 1936	10,000
Denver & Rio Grande R. R. Co. 1st Consolidated Gold Bonds, 4%, 1936	25,000
Erie R. R. Co. 2 yr. Secured Gold Notes, 5%, 1919	15,000
Erie R. R. Co. 2 yr. Gold Notes, 5%, 1919	10,000
Erie R. R. Co. Prior Lien Gold Bonds, 4%, 1996	55,000
Treasury Bonds of the German Empire, 5%, 1918	250,000
Treasury Bonds of the German Empire, 5%, 1918	200,000

44

45

46 *Exhibit B.*

11

Great Northern Railway 1st Refunding Mtg. Gold Bonds, Series A, 4¼%, 1961	11,000
Great Northern Railway Co. 1st & Refunding Mtg. Gold Bonds Series A, 4¼%, 1961	2,000
Great Northern Railway Co. 1st & Refunding Mtg. Gold Bonds, 4¼%, 1961	2,000
Great Northern Railway Co. 1st & Refunding Mtg. Gold Bonds, 4¼%,	
47 1961	5,000
Lake Shore & Michigan Southern Railways, 4%, 1928	2,000
Lake Shore & Michigan Railway Co., 4%, 1928	20,000
Lake Shore & Michigan Southern Railway Co., 4%, 1928	3,000
Lehigh Valley Railroad Consolidated Mtg. 4%, 1923	25,000
New York Central Railroad Co., 2 yr. Collateral Trust Gold Notes, 5%, 1919	25,000
Pennsylvania Railroad Co. General Mtg. Gold Bonds, Temporary Certificate,	
48 4½%, 1965	25,000
Philadelphia & Erie Railroad Company, 6%, 1920	25,000

(Sgd.) Thos. H. Phillips.

Rochester & Pittsburgh Railroad Co., Consolidated 1st Mtg., 6%, 1922	$19,000
Southern Railroad Notes, 5%, 1919	15,000

Exhibit B. 49

United States Liberty Loan (1917) 3½%, 1932, 1947	12,000
United States Liberty Loan, 3½%, 1932-1947	16,000
United States Liberty Loan, 3½%, 1932-1947	30,000
United States Liberty Loan, 3½%, 1932-1947	8,000
United States Liberty Loan, 3½%, 1932-1947	12,000
United States Liberty Loan, 3½%, 1932-1947	20,000
United States Liberty Loan, 3½%, 1932-1947	20,000
United States Liberty Loan, 4¼%	10,000
Chicago, Burlington & Quincy (Northern Pacific, Great Northern J. T.) Collateral, 4%, 1921	25,000
Chicago, Burlington & Quincy Collateral Trust Gold Bonds, 4%, 1921	25,000
Chicago and Rock Island and Pacific General Mtgs. 4%, 1988	15,000
Chicago and Rock Island and Pacific General Mtgs. 4%, 1988	10,000
Cleveland, Cincinnati, Chicago & St. Louis Equipment, 5%, 1927	10,000
Delaware & Hudson Equip., 4½%, 1922	7,000
Delaware & Hudson Equip., 1st Lien, 4½%, 1922	2,000
Delaware & Hudson 4½%, 1922	1,000
Wabash 1st Mtg. 5%, 1939	20,000
Converted United States Liberty Loan Bonds, 4¼%	25,000

(Sgd.) Thos. H. Phillips.

50

51

52 **Order Directing Seizure of Securities by Marshal.**

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

FRANCIS P. GARVAN, as Alien Property Custodian,
Libellant,

vs.

53 $100,000 PAR VALUE INTERBORO RAPID TRANSIT 5% BONDS, maturing in 1966, and other property.

Order of Service.

In this cause it appearing that Francis P. Garvan, as Alien Property Custodian, has instituted a proceeding in the nature of a libel of information against certain money or other property now situated and being within the Southern District of New York, and within the jurisdiction of this Court; and it appearing that said action is brought under
54 Section 17 of the Act of Congress known as the "Trading with the Enemy Act," as amended; and Francis G. Caffey, United States Attorney for the Southern District of New York, and proctor for libellant, having appeared and requested that this Court make and enter an order in aid of process in this cause, it is

Ordered that the Marshal of the Southern District of New York forthwith seize and take into possession the property described in the libel, which is

55

$100,000 par value Interboro Rapid Transit 5% Bonds, maturing in 1966, and other property, more particularly described and itemized in the schedule attached to said libel as Exhibit A. It is further

Ordered that said Marshal shall upon taking possession of said property serve upon Metropolitan Trust Company, of New York City, a true copy of the libel filed in this cause, and of this order in aid of process. It is further ordered that the Marshal give notice of the seizure of said property by advertisement three times a week for two successive weeks in the New York Evening Post, a newspaper published in said Southern District of New York. It is further

56

Ordered that all persons having or pretending to have any claim to possession of said property, or any part or parcel thereof, appear at a term of this Court to be held at the United States Courts in the Post Office Building, Borough of Manhattan, New York City, on the 30th day of July, 1919, at 10.30 o'clock A. M., or as soon thereafter as counsel can be heard, then and there to show cause, if any they have, why the possession of said property should not be delivered by the Marshal to the libellant, to be by him as Alien Property Custodian held, administered and accounted for according to law. It is further

57

Ordered that the Clerk of this Court issue process accordingly.

LEARNED HAND,
United States District Judge.

A true copy.

ALEX. GILCHRIST, JR.,
(Seal) Clerk.

58 **Monition.**

Southern District of New York, ss:

The PRESIDENT OF THE UNITED STATES OF AMERICA, To the Marshal of the Southern District of New York, Greeting: Whereas a Libel *in rem* and *personam* hath been filed in the DISTRICT COURT OF THE UNITED STATES for the Southern District of New York, on the 7th day of July, in the year of our Lord one thousand nine hundred and nineteen, by Francis P. Garvan, as Alien Property Custodian, Libellant,

59 against

Interboro Rapid Transit, 5%, 1966,	$100,000
Baltimore & Ohio Prior Lien, 3½%, 1925,	50,000
Carolina Clinchfield & Ohio Railroad, 5% 1938,	25,000
Chesapeake & Ohio Railway Company General Mtg. Gold Bond, 4½%, 1992,	50,000
Erie & Jersey 1st, 6%, 1955,	75,000
Louisville & Nashville, 4%, 1940 (R. R. Unified),	25,000
New Amsterdam Gas Co. 1st. Mtg. Bonds, 5%, 1948,	50,000
60 New York City Corporate Stock, 4¼%, 1930-1960,	100,000
New York City Corporate Stock, 4¼%, 1930-1960,	2,000
South and North Alabama Consolidated Mtg. Gold Bonds, 5%, 1963	40,000
Southern Pacific San Francisco Terminal 1st Mtg. 4%, 1950,	100,000
Toledo & Ohio Central Railway Company West Division Gold Bonds, 5%, 1935,	50,000

Monition. 61

Chesapeake & Ohio Big Sandy 1st Mtg. Gold Bonds, 4%, 1944,	2,000
Chesapeake & Ohio Big Sandy Railway Co. 1st Mtg. Gld Bonds, 4%, 1944,	1,000
Chesapeake & Ohio Big Sandy 1st. Mtg. Gold Coupons, 4%, 1944,	1,000
Chesapeake & Ohio Big Sandy Railway Co. 1st Mtg. Gold Bonds, 4%, 1944,	1,000
Chicago, Burlington & Quincy Railroad Co., General Mtg. Bond, 4%, 1958,	1,000
Chicago, Burlington & Quincy Joint, 4%, 1921,	30,000 62
West Virginia & Pittsburgh R. R. Co., 1st Mtg. Gold Bonds, 4%, 1990,	100,000
Cleveland, Cincinnati, Chicago & St. Louis Railway Company, 1st Mtg. Gold Bonds 4%, 1939,	50,000
Colorado & Southern Railway Co. Refunding Extension Gold Bonds, 4½%, 1935,	50,000
Union Pacific Railroad 1st Ry. & Land Grant, 4%, 1947,	100,000

for the reasons and causes in the said Libel mentioned, and praying process; and Monition of the said Court in that behalf to be made, and that all 63 persons interested in the said property, &c. may be cited in general and special to answer the premises, and all proceedings being had that the said property, &c., may for the causes in the said Libel mentioned, be conveyed, transferred, assigned, delivered or paid over to the Libellant, to be by him held, administered and accounted for as Alien Property Custodian in accordance with the provisions of law.

64 *Monition.*

You are therefore hereby commanded to attach the said property, &c., and to detain the same in your custody until further order of the Court, respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be conveyed, transferred, assigned, delivered or paid over, pursuant to the prayer of the said Libel, that they be and appear before the said Court, to be held in and for the Southern District of New York, on the 30th day of July, 1919, at
65 10:30 o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And we do hereby further empower, and strictly charge and command you, the said Marshal, that you cite and admonish the said Respondent if it shall be found in your District, that it be and appear before the said District Court, on the 30th day of July, 1919, at 10:30 A. M., at the U. S. Court Rooms in the U. S. Court House and Post Office Building, Borough of Manhattan, City of New York, then and to answer
66 the said Libel, and to make its allegations in that behalf; and have you then and there this writ, with your return thereon.

Witness, the Hon. Learned Hand, Judge of said Court, this 7th day of July in the year of our Lord one thousand nine hundred and nineteen and of our Independence the one hundred and forty-fourth.

ALEX GILCHRIST, JR.,
Clerk.

FRANCIS G. CAFFEY,
Proctor for Libellant.

Marshal's Return. 67

IN OBEDIENCE to the within Motion, I attached the bonds and securities named therein on July 9th, 1919, in the hands of the Metropolitan Trust Company of the City of New York, No. 60 Wall Street, New York City, by exhibiting to Bertram Cruger, as Treasurer of the Metropolitan Trust Company of the City of New York, the within original and at the same time leaving with him a certified copy thereof and at the same time and place left with him a copy of libel in this suit, and have given due notice as appears by proof of publication hereto annexed to all persons claiming same, that 68
this Court will, on the 30th day of July, 1919, instant (if this day shall be a day of jurisdiction, if not on the next day of jurisdiction thereafter) proceed to the trial and condemnation thereof should no claim be interposed for the same.

The securities named therein were placed in my special deposit account at the Chatham & Phoenix National Bank, No. 149 Broadway, New York City.

THOMAS D. MCCARTHY,
United States Marshal,
S. D. N. Y.

Dated New York, July 30, 1919.

69

70 **Notice of Claim.**

IN THE DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

FRANCIS P. GARVAN, as Alien Property Custodian,
Libelant,

against

71 ONE HUNDRED THOUSAND DOLLARS Par Value Interborough Rapid Transit 5% Bonds maturing in 1966 and other property.

Metropolitan Trust Company of the City of New York, Trustee, under a certain Indenture of Trust made the 23rd day of March in the year One thousand Eight hundred and Ninety-one between the Mannheim Insurance Company of Mannheim, Germany, party of the first part and the Atlantic Trust Company of the City of New York, party of
72 the second part and instruments supplemental thereto intervening herein appears before this Honorable Court and makes claim to the $100,000 par value Interborough Rapid Transit Five Percent Bonds maturing in 1966 and the other property more fully described in Exhibit A annexed to the libel herein as the same are attached by the Marshal and the process of this Court at the instance of Francis P. Garvin as Alien Property Custodian and the said Metropolitan Trust Company of the

73

City of New York avers that it was in possession of the said bonds and other property at the time of the attachment thereof and that as Trustee of the Trust created in and by said Indenture made the 23rd day of March, 1891, between Mannheim Insurance Company of Mannheim, Germany, and the Atlantic Trust Company and instruments supplemental thereto it is the owner of the said bonds and other property and that no other person is the owner thereof.

Wherefore it prays to defend accordingly.

74

METROPOLITAN TRUST COMPANY
OF THE CITY OF NEW YORK,
By JAS. F. McNAMARA,
Vice President.

CARTER, LEDYARD & MILBURN,
Proctors for Claimant,
Office and P. O. Address,
54 Wall Street,
Borough of Manhattan,
New York City.

75

76 *Notice of Claim.*

Southern District of New York, } ss.:
City and County of New York, }

James F. McNamara, being duly sworn, says that he is one of the Vice Presidents of the Metropolitan Trust Company of the City of New York Trustee under a certain trust deed executed and delivered on or about the 23rd day of March in the year one thousand eight hundred and ninety-one by the Mannheim Insurance Company to the Atlantic Trust Company of the City of New York; that about the year 1903 Metropolitan Trust Com-
77 pany of the City of New York merged with said Atlantic Trust Company and succeeded it as Trustee under the trust created in and by said Indenture; that at the time of the commencement of this suit the bonds and other property proceeded against therein were held by the Metropolitan Trust Company under the trust created by the indenture aforesaid and instruments supplemental thereto for the benefit of the policy holders of the Mannheim Insurance Company as therein provided and that he has read the foregoing claim and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

78 JAMES F. MCNAMARA.

Sworn to before me this 28th }
day of July, 1919. }
RUSH TAGGART, JR.,
Notary Public,
New York County.
New York Co. Clerk's No. 168, Reg. No. 10160.
Term expires March 30, 1920.

Answer. 79

IN THE DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

FRANCIS P. GARVAN, as Alien Property Custodian, Libelant, against ONE HUNDRED THOUSAND DOLLARS par value Interborough Rapid Transit 5% Bonds, maturing in 1966, and other property.	Answer.

80

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

Metropolitan Trust Company of the City of New York, as Trustee of the Trust under a certain Indenture made on the 23rd day of March, in the year 1891, between the Mannheim Insurance Company and the Atlantic Trust Company of the City of New York, and instruments supplement thereto, owner and claimant of the $100,000 par value of Interborough Rapid Transit Five Percent. Bonds, maturing in 1966, and other property proceeded against by Francis P. Garvan, as Alien Property Custodian, in this proceeding, answers the libel of information and complaint therein as follows: 81

1. The claimant admits that the petitioner is and since March 4th, 1919, has been the Alien Property

82 *Answer.*

Custodian of the United States, duly appointed and qualified as such pursuant to the provisions of the Act of Congress approved October 6th, 1917, known as the "Trading with the Enemy Act," and the amendments thereto and the executive orders and proclamations issued thereunder, and that said petitioner on the 4th day of March, 1919, succeeded A. Mitchell Palmer, who had been previously appointed and qualified as such Alien Property Custodian, and resigned such office on the 4th day of March, 1919, but the claimant, on information and
83 belief, denies that in making the determination set out in Paragraph II of the libel of information and in making the requirement and demand of April 15th, 1919, mentioned in Paragraph III of the libel of information, and in causing same to be served on this claimant as set out in Paragraph IV of the libel of information, the petitioner was acting pursuant to the provisions of the Trading with the Enemy Act or the executive orders and proclamations issued thereunder, but alleges on the contrary that he was acting outside of and in abuse of the authority conferred on him by said Act, executive orders or proclamations.

84 2. The claimant admits that the petitioner made the determination specified in Paragraph II of the libel of information, but denies, on information and belief, that such determination was made pursuant to the authority of said Trading with the Enemy Act or the Executive Orders or Proclamations issued thereunder or was made after an investigation, and avers, on information and belief, that it was wholly arbitrary and based upon no facts or evidence other than the facts herein set out.

Answer.

85

3. The claimant denies, on information and belief, each and every allegation contained in the paragraph numbered III of the libel of information, except that it admits that the property therein referred to was on the 15th day of April, 1919, in its possession.

4. It denies, on information and belief, each and every allegation contained in the paragraph numbered IV of the libel of information, except that it admits that on April 17th, 1919, an instrument or document was delivered to it, of which instrument or document Exhibit B annexed to the libel of information and referred to in Paragraph IV thereof is a true copy.

86

5. It admits that the property set forth and described in the schedule annexed to the libel of information and marked Exhibit A remained in its custody, possession and control within the Southern District of New York and within the jurisdiction of this Court until the same was attached by the Marshal under process of this Court in this suit.

6. The claimant admits the jurisdiction of this Court, but denies, on information and belief, each and every other allegation contained in the paragraphs of the libel of information numbered VI and VII.

87

And further answering the libel of information, the claimant alleges, on information and belief, as follows:

7. The Mannheim Insurance Company was on the 23rd day of March, 1891, and has ever since

88 *Answer.*

been a corporation organized and existing under the laws of the Grand Duchy of Baden, Germany, and engaged in the business of marine insurance in the State of New York and the Commonwealth of Massachusetts and elsewhere in the United States.

8. On or about the 23rd day of March, 1891, said Mannheim Insurance Company and the Atlantic Trust Company of the City of New York, a corporation organized and existing under the laws of the State of New York, executed a certain Indenture, of which a copy is hereto annexed and made a part
89 hereof and marked Exhibit I, whereby said Mannheim Insurance Company set over and transferred to said Atlantic Trust Company of the City of New York and its successors the property therein described, in trust, for the uses and purposes therein set forth. Thereafter by instruments supplemental to the Indenture of Trust hereinbefore set forth said Mannheim Insurance Company transferred and set over to said Atlantic Trust Company of the City of New York other property and securities to be held by said Atlantic Trust Company of the City of New York upon the trust and for the purposes set out in said Indenture dated the 23rd day of March,
90 1891. Thereafter in or about the year 1903 the Metropolitan Trust Company of the City of New York, the claimant herein, merged the said Atlantic Trust Company of the City of New York under and pursuant to the statutes of the State of New York and thereby became the successor of said Atlantic Trust Company of the City of New York in the trust created by the Indenture dated the 23rd day of March, 1891, hereinbefore set forth, and became

Trustee of said trust and as such Trustee owner of the property and securities theretofore set over and transferred to said Atlantic Trust Company of the City of New York for the purposes thereof. Thereafter from time to time the Mannheim Insurance Company and this claimant, Metropolitan Trust Company of the City of New York, executed further instruments supplemental to the Indenture of Trust executed by said Mannheim Insurance Company and the Atlantic Trust Company of the City of New York on the 23rd day of March, 1891, and said Mannheim Insurance Company in and by said supplemental instruments from time to time set over to the Metropolitan Trust Company of the City of New York, claimant herein, other securities and property to be held by it for the purposes and upon the trust set out in said Indenture dated the 23rd day of March, 1891. The One hundred thousand dollars par value of Interborough Rapid Transit Five Percent. Bonds, maturing in 1966, and other property against which this libel of information has been filed, and which is more particularly described in Exhibit A annexed to the libel of information herein, were at all of the times mentioned in the libel of information and have since been held by the claimant herein as Trustee under the said Indenture dated March 23rd, 1891, and the various instruments supplemental thereto, hereinbefore described, for the uses and purposes set forth in said Indenture dated March 23rd, 1891, and this claimant, as such Trustee, was at all of said times and now is the owner of all of said property, and as such owner was in possession thereof until the same was seized by the Marshal in this proceeding.

91

92

93

94 *Answer.*

9. This claimant, Metropolitan Trust Company of the City of New York, is a corporation organized and existing under the laws of the State of New York and having its principal place of business therein, and was not at any of the times mentioned in the libel of information and is not now an enemy or an ally of an enemy, or did A. Mitchell Palmer, when Alien Property Custodian, nor has the libelant herein, as Alien Property Custodian, found or determined after investigation or otherwise that this claimant is an enemy or an ally of
95 an enemy.

10. The Mannheim Insurance Company from the time of the execution of said Indenture dated the 23rd day of March, 1891, until subsequent to the beginning of the war between the United States of America and the German Empire was engaged in the business of marine insurance in New York and Massachusetts and elsewhere in the United States, and issued its policies in large amounts to citizens and residents of the United States, and at the time of the beginning of the war between the United States and the German Empire it had outstanding policies of very large amounts held by citizens and
96 residents of the United States and it still has outstanding policies of very large amounts held by such citizens and residents, and at all the times mentioned in the libel of information liabilities existed against it and still exist for very large amounts in favor of policyholders in states, commonwealths, districts and territories of the United States.

11. The policyholders of the Mannheim Insurance Company in the states, commonwealths, dis-

tricts and territories
favor liabilities exist
tioned in the libel
were not and are no
enemy, and neither A
Property Custodian,
Alien Property Custo
vestigation or other
are enemies or allies

s of the United States in whose
ted against it at the times men-
of information and still exist
ot now enemies or allies of an
A. Mitchell Palmer, when Alien
nor the libelant herein, as such
odian has determined after in-
rwise that such policyholders
s of an enemy.

12. No certificate i
the Insurance Commi
of Massachusetts sta
property and securiti
ing has been institute
purposes of the trus
dated the 23rd day of
ments supplemental
claimant is informed
curities are needed for

in writing has been signed by
issioner of the Commonwealth
ating that any portion of the 98
ies against which this proceed-
ed is no longer needed for the
st set out in said Indenture
f March, 1891, and the instru-
thereto, and as far as the
all of said property and se-
r the purposes of said trust.

13. This claimant
missions and compens
entitled as trustee of
property proceeded ag
to it and is entitled to
erty not only for the
trusts and to secure t
ment of the amounts d
in accordance with the
all the commissions a
due it have been ascert
the payment thereof.

has not been paid the com-
sation to which it is lawfully
f the trusts upon which the
gainst herein was transferred
o the possession of said prop-
purpose of carrying out said 99
the beneficiaries thereof pay-
due or to become due to them
terms thereof, but also until
and compensations lawfully
ained and paid and to secure

14. The libelant her
termination that the s

rein made his so-called de-
securities and property pro-

ceeded against herein are the property of an enemy with full knowledge of all the facts hereinbefore set forth and not as the result of any investigation into other or further facts, but based such so-called determination solely upon the ground that notwithstanding the facts hereinbefore set forth he was entitled as a matter of right to take possession of said property and securities in disregard of the title of this claimant thereto, as Trustee of the trust hereinbefore described.

Wherefore, this claimant asks that the libel of information be dismissed, with costs, and that the order heretofore made herein directing the Marshal for the Southern District of New York to seize and take possession of the securities and property which are the subject of this proceeding be vacated and that this Honorable Court make an order restoring said securities and property to the possession of this claimant, and for such further order or relief in the premises as to this Honorable Court may seem just and proper.

METROPOLITAN TRUST COMPANY
OF THE CITY OF NEW YORK,
Claimant.

By BEVERLY CHEW,
Vice-President.

CARTER, LEDYARD & MILBURN,
Proctors for Claimant,
Office & Post Office Address,
54 Wall Street,
Borough of Manhattan,
New York City.

103

United States of America,
Southern District of New York,
City and County of New York, } ss.:

Beverly Chew, being duly sworn, deposes and says that he is a Vice-President of Metropolitan Trust Company of the City of New York, the claimant named in the foregoing answer; that he has read the foregoing answer and knows the contents thereof; that all and singular the allegations of said answer are true to the best of his knowledge, information and belief.

104

BEVERLY CHEW.

Sworn to before me this 22nd day of August, 1919.

A. S. FOWLER,
(Seal) Notary Public.
Kings Co. N. Y. No. 79, Reg. No. 182.
Certificates filed New York Co., N. Y., No. 252, Reg. No. 10196.
Queens Co., N. Y., No. 964.
Commission expires March 30, 1920.

105

106 **Exhibit I.**

THIS INDENTURE, made the twenty-third day of March, in the year one thousand eight hundred and ninety-one between the Mannheim Insurance Company (Mannheimer Versicherungsgesellschaft) of Mannheim, Germany, party of the first part, and the Atlantic Trust Company of the City of New York, party of the second part, witnesseth:

Whereas, the party of the first part is a foreign insurance Company duly organized and existing under the laws of the Grand Duchy of Baden, Germany, and carrying on the business of marine in-
107 surance by duly authorized agents in the State of New York and the Commonwealth of Massachusetts and elsewhere in the United States; and

Whereas, the party of the first part desires to establish a special fund of assets in the United States in the present sum of Fifty thousand dollars in trust for the benefit and security of all the policy holders of the party of the first part in the United States and separate and distinct from the deposits required from it or which may hereafter be required from it for similar purposes, to be made with the Treasurer or with the Superintendent of the Insurance Department, or with other designated of-
108 ficial of any State, Commonwealth, District or Territory of the United States under the statutes of such State, Commonwealth, District or Territory.

Know all men by these presents, that the party of the first part does hereby set over and transfer to the above named party of the second part and its successors the said fund, a Schedule of which is hereto annexed marked A, to hold the same and such other funds as may be hereafter added

thereto, for the purposes hereinafter stated and upon the trusts, covenants, agreements and provisions hereinafter declared and set forth. And in supplement to said fund and subject to the same trust, the party of the first part does hereby give, grant, assign and convey unto the said party of the second part all and singular the bonds and stocks deposited by it with the Treasurer of the Commonwealth of Massachusetts and with the Superintendent of the Insurance Department of the State of New York and held in trust by those officials provided, however, that the interest and title of the party of the first part in and to said bonds and stocks shall always be held by the party of the second part subject to all the trusts, restrictions and liabilities created by the Statutes requiring them to be deposited. 110

First. The party of the second part shall receive, hold, possess and preserve all and singular the aforesaid funds so now delivered or transferred to it, and such other funds as may hereafter be delivered or transferred to it by the party of the first part for the purpose of complying with and satisfying the provisions of the general laws and lawful governmental regulations of any State, Commonwealth, District or Territory in the said United States wherein the party of the first part may do business, and for the further purpose of fully securing at all times all liabilities which may exist against the party of the first part in favor of policy holders in any state, commonwealth, district or territory of the said United States during the existence of these presents or of the trust hereby created. 111

112 *Exhibit I.*

Second. All interest and income which shall accrue upon or from the said trust fund in the hands of the party of the second part shall be collected by the party of the second part and paid by it to the party of the first part or to its agents duly authorized to receive the same in the City of New York.

Third. Subject to the direction of the party of the first part as expressed by its officers and Board of Directors, the party of the second part is hereby authorized and empowered and is bound to sell or
113 collect any property or security for the time being forming part of or representing the said trust fund, and to invest and reinvest the proceeds of such sale or collection; and it shall have power, with such consent as aforesaid, to make all necessary sales, conveyances, assignments, transfers and purchases.

And the party of the first part does hereby authorize and empower the party of the second part and its substitutes, and to that end does appoint it and them its true and lawful attorneys, to call for and receive from time to time (when directed as aforesaid) from the Treasurer of the Commonwealth of Massachusetts or from the Superintend-
114 ent of the Insurance Department of the State of New York, or from either of them, the said bonds and stocks so now or hereafter deposited with them, or any portion of such bonds or stocks, in exchange for any other lawful securities to be deposited by the party of the second part with said official or officials; and for the purpose of effecting such exchange, the party of the second part may use any portion of the trust fund by these presents created and in that event shall retain and hold as a part of

said trust fund any bonds, stocks or securities received by it from said officials or either of them.

Fourth. The party of the second part shall keep full and accurate accounts and records of the property received and held by it and of all its transactions in relation to the same; and shall from time to time, when required by the party of the first part or its authorized agent or agents, or by the Superintendent of the Insurance Department or similar official of any State, Commonwealth, District or Territory of the United States make and certify a statement of said trust fund and of the investments thereof, and of the items of which said trust fund may for the time being consist, and shall furnish such certificate and description in the number of copies that may be required by the person or persons calling for the same, together with all necessary vouchers in verification of the same; and the records and accounts of the party of the second part relating to said trust shall be at all times open to the inspection of the party of the first part or its duly authorized agent or agents and to the proper official of any of the said States and such official may examine the party of the second part and the assets in trust and all books and papers relating thereto in the same manner that he may examine the officers, agents, assets and affairs of Insurance Companies.

Fifth. If at any time debts and liabilities for the security of which this trust was created shall become due and payable by the party of the first part, and shall not be otherwise satisfied and paid by the party of the first part, the party of the second part

118 *Exhibit I.*

is authorized, empowered and required to appropriate so much of the said trust property as may be necessary for the payment and satisfaction thereof, and for that purpose may sell, assign, convey and transfer so much of said property and estate held by them under these presents as may be necessary therefor without the previous consent of the party of the first part; but no alleged debt or liability shall be so paid or satisfied, nor shall the party of the second part sell or dispose of any portion of said property and estate held by them under the
119 provisions of these presents for the purpose of satisfying the same, unless and until the amount and validity of said alleged debt or liability in each case shall have been admitted by the party of the first part and evidence thereof in writing shall have been produced to the party of the second part, or until the validity and amount of such alleged debt or liability shall have been established by the claimant in due course of law; and due notice of all such payments by the party of the second part shall be given by the party of the second part to the Insurance Commissioner of the Commonwealth of Massachusetts, and to the like official of any other State, Commonwealth, District or Territory of the said
120 United States which may, by notice from such official or from the party of the first part to the party of the second part be designated as one requiring notice of such payment.

Sixth. It shall be competent for the party of the first part from time to time to increase to diminish the amount of said trust fund by adding thereto further funds, or by withdrawing therefrom any funds, provided, however, that no portion of the

121

said funds or of any of the property held by the party of the second part shall be by it surrendered to the party of the first part, unless a certificate in writing be first signed by the Insurance Commissioner of the Commonwealth of Massachusetts and by the like official of any other State, Commonwealth, District or Territory of the United States in which the existence of this fund shall have been declared in writing to the party of the second part by such official or by the party of the first part to be essential to authorize the party of the first part to transact business, stating what portion of said funds is no longer needed for the purposes of the trust and the amount so surrendered by the party of the second part to the party of the first part shall not exceed the portion so specified in such certificate.

122

Seventh. Subject to making due provision for the purposes aforesaid and subject to the provisions hereinbefore contained the party of the second part shall stand possessed of the said trust fund at the control and subject to the order of the party of the first part, and shall and will use and dispose of the same as it may direct or appoint.

123

Eighth. The party of the second part and its successors or any of them may at any time resign this trust and the vacancy created by every such resignation shall and may be filled by the party of the first part in the manner hereinafter provided for filling the vacancy in case of the removal of the trustee and the party of the first part shall have power at any time and from time to time without assigning cause therefor to remove the party of the second part or

124 *Exhibit I.*

its successors by notice of such removal in writing witnessed by the seal of the said corporation and thereupon the party of the first part shall and may at any time or times thereafter appoint a successor or successors to the said trustee or trustees so removed, provided such appointment is satisfactory to and approved by the Insurance Commissioner of the Commonwealth of Massachusetts and by the like official of any other State, Commonwealth, District or Territory of the United States in which the existence of this fund shall have been declared in writing to the party of the second part by such
125 official or by the party of the first part to be essential to authorize it to transact business; and no such resignation or removal shall be effectual until a successor has been so appointed and approved and has accepted such appointment and the trustees so appointed and approved shall upon accepting such appointment without further act or deed have and possess all the estates, rights and powers conferred upon the said trustee named in this instrument in and by the provisions thereof and shall be subject to all the duties imposed upon such trustee.

Ninth. Immediate written notice of any and all
126 changes in the persons comprising said trustees, parties of the second part, shall be given by the party of the first part to the Insurance Commissioner or like official of any State, Commonwealth, District or Territory of the United States in which the existence of this fund shall be essential to authorize it to transact business.

Tenth. The party of the second part and its successor or successors shall not be liable or respons-

Exhibit I.

127

ible for any loss to the said trust fund unless the same shall be due to its own neglect or misfeasance.

Eleventh. The party of the second part hereto accepts the trusts above created and declared upon the terms above expressed and signify such acceptance by joining in the execution of these presents.

In Witness Whereof the said Mannheim Insurance Company (Mannheimer Versicherungsgesellscheft) has caused these presents to be sealed quadruplicate with its common seal and subscribed by Mr. Ferdinand Scipio, Vice-President, and attested by Mr. R. Post, the Secretary of the said 128
Company; and the said Atlantic Trust Company has caused these presents to be sealed in quadruplicate with its common seal and subscribed by . President and attested by its Secretary.

(Signed) F. Scipio, Vice-President.
Corporate Seal. R. Post, Secretary.

Atlantic Trust Company (L. S.)
by W. H. Male, President
J. S. Suydam, Secretary.

Corporate Seal.

129

(Here follow the notarial and consular certificates and attestations.)

130 *Exhibit I.*

State of New York, }
City and County of New York, } ss.:

Be it known that on this fourth day of April in the year One thousand eight hundred and ninety one before me the undersigned George H. Corey a Notary Public of the State of New York, duly commissioned and sworn, and dwelling in the City of New York, personally appeared W. H. Male and J. S. Suydam, with whom I am personally acquainted, and known to me to be the President and Secretary
131 of the Atlantic Trust Company, who being by me duly sworn, say that they reside in the City of Brooklyn, County of Kings and State of New York, that the seal which is affixed to the above instrument is the corporate seal of the said Corporation, and was so affixed by their authority, and that they signed their names thereto as President and Secretary by like authority

In Witness Whereof I have hereunto set my hand and affixed my official seal the day and year last aforesaid.

GEO. N. COREY,
Notary Public,
132 (Notarial Seal) 52 Wall St., New York.

Exhibit I. 133

United States Consulate Grand Duchy of Baden, Empire of Germany, City and County of Mannheim, } ss.:

March 23, 1891.

I, Jno. F. Winter, Consul of the United States at Mannheim, de hereby certify that the signature of Ferdinand Scipio and R. Post, Vice-President and Secretary, respectively, of the Mannheim Insurance Company at the foot of the paper hereto annexed are true and genuine signatures made and acknowledged in my presence, and that the said persons are known to me to be the same persons described in and who executed the above document and acknowledged it to be their act and deed and are personally known to me. 134

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Consulate at Mannheim this day and year next above written, and of the Independence of the United States the

(Signed) JNO. F. WINTER,
United States Consul. 135

Consular Seal No. 27

136 **Schedule "A."**

Fifty thousand (50,000) dollars of the Consolidated Stock (for new parks) of the City of New York, payable November 1, 1909, 1929, with interest at 2-1/2%.

State of New York, }
County of New York, } ss.:

137 I hereby certify that I have compared the foregoing eight pages with the original indenture dated March 23, 1891, and I find the same to be a true and correct copy thereof.

A. E. VOOLER,
Notary Public,
Kings Co., N. Y., No. 7.

Reg. No. 8007. Certificates filed New York Co., N. Y. No. 18; Reg. No. 8024; Queens Co., N. Y. No. 964.

Commission expires March 30, 1918.

(Notarial Seal)

138

Notice of Motion for Judgment on Pleadings. 139

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

FRANCIS P. GARVIN, as Alien Property Custodian, Libellant,

against

$100,000 PAR VALUE INTERBORO RAPID TRANSIT 5% BONDS, Maturing in 1966, and Other Property. 140

69-211

Sirs:

Please take notice that on the libel, notice of claim and answer of Metropolitan Trust Company, claimant, heretofore filed herein and upon all proceedings heretofore had herein, I shall move this Court at a Term thereof for the hearing of motions to be heard in the United States Courts and Post Office Building, Borough of Manhattan, City of New York, on the 17th day of October, 1919, at the opening of Court or as soon thereafter as counsel may be heard, for a decree awarding possession to the libellant as Alien Property Custodian, of the property seized in this proceeding by the United States Marshal for the Southern District of New York, being the property specified in Exhibit "A" attached

141

142 *Notice of Motion for Judgment on Pleadings.*

to the libel and awarding to the libellant herein the costs of this proceeding to be taxed, and for such other relief as in the premises may seem just.

Dated New York, N. Y., October 10, 1919.

Yours, etc.,

FRANCIS G. CAFFEY,
United States Atorney for the
Southern District of New York,
Proctor for Libellant,
Office and Post Office Address,
143 United States Courts and
Post Office Building,
Borough of Manhattan,
City of New York.

To CARTER, LEDYARD & MILBURN, Esqs.,
Proctors for Claimant, Metropolitan
Trust Company.

144

Opinion. 145

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant, against ONE HUNDRED THOUSAND DOLLARS Par Value Interborough Rapid Transit 5% Bonds Maturing in 1966, and Other Property.	Motion for Decree upon the Pleadings. 146

FRANCIS G. CAFFEY, United States Attorney (EARL B. BARNES, Assistant U. S. Attorney, of Counsel), Proctor for Libellant;

CARTER, LEDYARD & MILBURN (WALTER F. TAYLOR, of Counsel), Proctors for Claimant.

KNOX, D. J.: The facts in this case differ in no 147
essential particular, at least so far as the principles of law applicable thereto are concerned, from those present in Garvan, as Alien Property Custodian, vs. $50,000 Par Value Bonds, etc., decided by Judge Augustus N. Hand upon July 29, 1919. And entertaining, as I do, the opinion that the conclusion reached in the last-mentioned case is correct, I see no useful purpose to be served in entering upon a discussion of the propositions of law involved.

148 *Opinion.*

In litigation quite similiar to that now before me, to wit, Garvan vs. $6,000 Par Value Delaware & Hudson 4% Bonds, etc., and Garvan vs. $20,000 Par Value Colorado & Southern First Mortgage 4% Bonds, etc., decided September 11, 1919, Judge Hand again took the position assumed by him in the case first hereinbefore referred to. It may, therefore, be said that his judgments have in effect established the law of this forum in this class of cases, and that law, it seems to me, even if I held a differing view, should not, unless for the most persuasive reasons, change with the personnel of
149 the Court.

Proctors for the claimant have requested, in the event of an adverse decision, that it be permitted to amend its answer so as to specifically raise the question that the Trading with the Enemy Act, if it bears the construction placed upon it by Judge Hand, is contrary to certain provisions of the Federal Constitution. To this amendment I have no objection, and will permit it if done within ten days. Upon the expiration of such time the libellant may take a decree with a stay pending an appeal, if it be taken within twenty days from this date.

150 November 6, 1919.

U. S. District Judge.

Final Decree. 151

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the United States Court and Post Office Building in the said District, on the 21st day of November, in the year of our Lord One Thousand Nine Hundred and Nineteen.

Present—Honorable JOHN C. KNOX, District Judge.

152

FRANCIS P. GARVAN, as Alien Property Custodian,

against

$100,000 Par Value Interborough Rapid Transit 5% Bonds maturing in 1966; and other property.

Decree. 69/211.

153

This cause came on to be heard at this term and was argued by Counsel and thereupon upon consideration thereof it was ordered, adjudged and decreed as follows, viz.:

That the libellant herein have judgment awarding to him possession of the bonds, stocks and other

154 *Final Decree.*

securities described in Exhibit "A" annexed to the libel herein to be by him held, administered and accounted for as Alien Property Custodian; it was further ordered, adjudged and decreed

That the United States Marshal for the Southern District of New York deliver to the libellant, as Alien Property Custodian, the bonds, stocks and other securities described in Exhibit "A" annexed to the libel herein and heretofore seized by him; and the libellant's costs having been duly taxed herein in the sum of Eighty-one and 24/100 dollars, it was further ordered, adjudged and decreed

155 That the libellant recover of the claimant, Metropolitan Trust Company of the City of New York, as Trustee, and the United States Fidelity & Guaranty Company, the stipulator for costs herein, the sum of Eighty-one and 24/100 dollars as costs duly taxed and that execution issue therefor.

That unless an appeal be taken from this decree, on behalf of the claimant within the time fixed by the rules of this Court the stipulator for costs on the part of the claimant shall cause the engagement of its stipulation to be performed or show cause within four days' time why judgment and execution shall not issue against it, its goods, chattels and 156 accounts for the satisfaction of this decree; it was further ordered, adjudged and decreed

That all proceedings herein shall be without prejudice to the claimant or to any other persons with respect to any claims they may see fit to file with the Alien Property Custodian pursuant to Section 9 of the Trading with the Enemy Act or

any suit they may see fit to institute thereunder following the filing of their claims; it was further ordered, adjudged and decreed

That during ten days from the date hereof and in the event that an appeal is taken from this decree within said time, pending said appeal, the libellant herein and the United States Marshal be and they hereby are stayed from taking any action in execution of this decree.

JOHN C. KNOX,
U. S. D. J.

158

159

160 **Assignment of Errors.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

FRANCIS P. GARVAN, as Alien Property Custodian, Libelant and Appellee, against ONE HUNDRED THOUSAND DOLLARS par value Interborough Rapid Transit 5% Bonds maturing in 1966 and other property.	Assignment of Errors. 69/211.

161

Metropolitan Trust Company of the City of New York, claimant and appellant in the above entitled cause, files the following assignment of errors upon which it will rely in its prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court and entered on the 21st day of November, 1919.

162 1. The Court erred in granting the motion of libelant for a decree upon the pleadings.

2. The Court erred in not denying the motion of the libelant for a decree on the pleadings.

3. The Court erred in holding that the property proceeded against in this cause was property which the libelant as Alien Property Custodian pursuant to the authority vested in him as such official had after investigation determined to belong to and

163

to be held for, by, on account of and for the benefit of the Mannheim Insurance Company.

4. The Court erred in failing to rule that the property proceeded against in this cause was not property owing or belonging to or held for, by, on account of or on behalf of or for the benefit of the Mannheim Insurance Company.

5. The Court erred in failing to rule that the determination of the libelant as Alien Property Custodian that the property proceeded against in this cause belonged to and was held for, by, on account of or for the benefit of the Mannheim Insurance Company was not made after investigation and was not a determination which the Alien Property Custodian was authorized by the Trading with the Enemy Act or by the Executive Proclamations issued pursuant thereto to make.

164

6. The Court erred in failing to rule that the determination of the Alien Property Custodian that the property proceeded against in this cause belonged to and was held for, by, on account of or for the benefit of the Mannheim Insurance Company was not made after investigation and was arbitrary and without authority of law.

165

7. The Court erred in failing to rule that the claimant herein holds a lawful mortgage, pledge, lien or other right in the nature of security in the property proceeded against in this cause to secure the payment of creditors and policyholders of the Mannheim Insurance Company and is expressly authorized by the terms of the Trading with the Enemy Act to continue to hold said property.

166 *Assignment of Errors.*

8. The Court erred in failing to rule that the claimant holds the property proceeded against in this cause as Trustee of the trusts for the benefit of the policyholders and creditors of the Mannheim Insurance Company in the United States set out in the Indenture of Trust annexed to and made a part of the answer and the instruments supplemental thereto and that the claimant as such Trustee is entitled to hold possession of said property until said trusts are fully performed.

9. The Court erred in ruling that the Alien Prop-
167 erty Custodian was authorized by the Trading with the Enemy Act to require delivery to him or to take possession of the property proceeded against in this cause notwithstanding the rights and interests therein of the claimant and the creditors and policyholders of the Mannheim Insurance Company in the United States.

10. The Court erred in failing to rule that the Trading with the Enemy Act could not authorize the Alien Property Custodian to take possession of the property proceeded against in this cause without contravening the provisions of the Fifth Amendment of the Constitution of the United
168 States declaring that no person shall be deprived of property without due process of law.

11. The Court erred in that it ordered, adjudged and decreed that the libelant herein have judgment awarding to him the possession of the property proceeded against in this cause and that the United States Marshal of the Southern District of New York deliver to said libelant as Alien Property Custodian the said property and that the libelant have judgment for his costs.

Assignment of Errors. 169

12. The Court erred in that it did not order, adjudge and decree that the libel of information be dismissed with costs and did not provide and direct the United States Marshal for the Southern District of New York to restore the property proceeded against in this cause to the possession of the claimant.

Dated New York, November 25, 1919.

CARTER, LEDYARD & MILBURN,
Proctors for Metropolitan Trust
Company of the City of New York,
Claimant and Appellant,
Office and P. O. Address,
54 Wall Street,
Borough of Manhattan,
New York City. 170

To FRANCIS G. CAFFEY, Esq.,
Proctor for Libelant and Appellee,
U. S. Post Office Building,
Borough of Manhattan,
New York City, N. Y.

ALEXANDER J. GILCHRIST, Esq.,
Clerk of the United States District Court,
For the Southern District of New York. 171

172 **Stipulation As To Record.**

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

FRANCIS P. GARVAN, as Alien Property Custodian,
Libelant-Appellee,

against

173 ONE HUNDRED THOUSAND DOLLARS Par Value Interborough Rapid Transit 5% Bonds, maturing in 1966, and other property.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated January 15th, 1920.

CARTER, LEDYARD & MILBURN,
174 Attorneys for Claimant-Appellant.
FRANCIS G. CAFFEY,
United States Attorney,
Attorney for Libelant.

Clerk's Certificate. 175

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

FRANCIS P. GARVAN, as Alien Property Custodian,
Libelant-Appellee,

against

ONE HUNDRED THOUSAND DOLLARS Par Value Interborough Rapid Transit 5% Bonds, maturing in 1966, and other property. 176

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this day of January, in the year of our Lord one thousand nine hundred and twentieth, and of the Independence of the said United States the one hundred and forty-fourth. 177

(Seal)

ALEX. GILCHRIST, JR.,
Clerk.

United States Circuit Court of Appeals for the Second Circuit, October Term, 1919.

Submitted March 15, 1920.

Decided March 18, 1920.

No. 203-210.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant-appellee,

against

$100,000 PAR VALUE INTERBOROUGH RAPID TRANSIT 5% BONDS, etc.; Metropolitan Trust Company of New York, as Trustee, Claimant-Appellant.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant-Appellee,

against

$6,000 PAR VALUE DELAWARE & HUDSON 4% BONDS; BANKERS TRUST COMPANY, Trustee, Claimant-Appellant.

Appeals from the District Court of the United States for the Southern District of New York.

Before Ward, Rogers, and Hough, Circuit Judges.

Francis G. Caffey, U. S. Attorney, for Libellant-Appellee.
Carter, Ledyard & Milburn, for Metropolitan Trust Co.
White & Case, for Bankers Trust Co.

Per Curiam:

The Decrees in these cases are affirmed in accordance with our opinion lately handed down in the cases of Garvan v. $20,000 Bonds, Garvan v. $100,000 Bonds, Garvan v. $50,000 Bonds, and Garvan v. $25,000 Bonds.

At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 29th day of March one thousand nine hundred and twenty.

Present: Hon. Henry G. Ward, Hon. Henry Wade Rogers, Hon. Charles M. Hough, Circuit Judges.

FRANCIS P. GARVAN, as Alien Property Custodian, et al., Libellant-Appellee,

v.

$100,000 PAR VALUE INTERBOROUGH RAPID TRANSIT 5% BONDS, etc.; Metropolitan Trust Company of New York, as Trustee, etc., Claimant-Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed.

H. G. W.
H. W. R.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

[Endorsed:] United States Circuit Court of Appeals Second Circuit. F. P. Garvan v. $100,000 I. R. T. Bonds. Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed Mar. 29, 1920. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant and Appellee,

against

ONE HUNDRED THOUSAND DOLLARS PAR VALUE INTERBOROUGH Rapid Transit Five Per Cent Bonds, Maturing in 1966, and Other Property; Metropolitan Trust Company of the City of New York, Trustee under a Certain Indenture of Trust Made the 23rd Day of March, 1891, Claimant and Appellant.

Petition for Writ of Error.

To the Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes the Claimant-Appellant, by *their* attorneys and complain- that in the record of the proceedings and also in the rendition of the order for mandate of the United States Circuit Court of Appeals for the Second Circuit, sitting in New York City, in the State of New York, in the above styled and numbered cause on the 29th

day of March, A. D. 1920, affirming the decree of the United States District Court for the Southern District of New York in said cause, a manifest error has intervened to the great damage of the petitioner; that the jurisdiction of the District Court of the United States for the Southern District of New York in the said cause did not depend upon the diversity of citizenship of the parties but depended upon the fact that it arose under the laws of the United States, and that the case did not arise under the patent laws, under the trademark laws, under the copyright laws, under the revenue laws, nor under the criminal laws of the United States nor was the said case an admiralty case, nor was the cause one arising under "An Act to establish a uniform system of bankruptcy throughout the United States" nor one arising under "An Act relating to the liability of common carriers by railroads to their employes in certain cases," nor one arising under "An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon," nor one arising under "An Act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes" nor one arising under any amendment or supplement to any of the aforementioned Acts, that the amount involved in the case exceeds the sum of One thousand Dollars ($1,000) besides costs, and that this is not a case where the judgment or decree of the Circuit Court of Appeals is made final.

Wherefore, petitioner prays for an allowance of the writ of error to the end that the cause may be carried to the Supreme Court of the United States and for such process as is necessary to perfect the writ of error prayed for to the end that the error therein may be corrected.

Dated, May 26th, 1920.

CARTER, LEDYARD & MILBURN,
Proctors for Claimant-Appellant.

Office and P. O. Address, 80 Broadway, New York City, N. Y.

[Endorsed:] U. S. Circuit Court of Appeals for the Second Circuit. Francis P. Garvan as Alien Property Custodian, Libellant-Appellee, against One Hundred Thousand Dollars Par Value Interborough Rapid Transit Bonds, etc., Metropolitan Trust Company of the City of New York, Trustee, etc., Claimant-Appellant. Copy. Petition for Writ of Error. Carter, Ledyard & Milburn, Proctors for Claimant-Appellant, 54 Wall Street, Borough of Manhattan, New York City. Filed June 1, 1920.

United States Circuit Court of Appeals for the Second Circuit.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant and Appellee,

against

ONE HUNDRED THOUSAND DOLLARS PAR VALUE INTERBOROUGH Rapid Transit Five Per Cent Bonds, Maturing in 1966, and Other Property; Metropolitan Trust Company of the City of New York, Trustee under a Certain Indenture of Trust Made the 23rd Day of March, 1891, Claimant and Appellant.

Order Allowing Writ of Error.

The claimant-appellant having filed its petition for a writ of error from the Supreme Court of the United States to this Court, to review the order for mandate of this Court made and entered on March 29, 1920, it is

Ordered that the said writ of error of said claimant-appellant to review said order for mandate, be, and the same is hereby allowed; and it is

Further ordered that the claimant-appellant file a bond in the sum of Two hundred and fifty dollars on or before the 29 day of May, 1920, the same to act as a bond for costs.

Dated, May 28, 1920.

H. G. WARD,
United States Circuit Judge.

[Endorsed:] United States District Court of Appeals for the Second Circuit. Francis P. Garvan as Alien Property Custodian, Libellant and Appellee, against One Hundred Thousand Dollars Par Value, etc.; Metropolitan Trust Company of the City of New York, etc., Claimant and Appellant. Copy. Order Allowing Writ of Error. Carter, Ledyard & Milburn, Proctors for Claimant-Appellant, 54 Wall Street, Borough of Manhattan, New York City. Filed June 1, 1920.

District Court of the United States for the Southern District of New York.

FRANCIS P. GARVAN, as Alien Property Custodian, Libelant and Appellee,

against

ONE HUNDRED THOUSAND DOLLARS PAR VALUE INTERBOROUGH Rapid Transit 5% Bonds, Maturing in 1966, and Other Property, Metropolitan Trust Company of the City of New York, as Trustee under a Certain Indenture of Trust Made the 23d Day of March, 1891, Claimant-Appellant.

Assignment of Errors.

Now comes the Claimant in the above entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above entitled cause from the order of mandate of this Honorable Court made and entered on March 29, 1920.

1. The Court erred in affirming the decree of the District Court of the United States for the Southern District of New York, made and entered on November 21, 1919, granting the libellant a decree on the pleadings.

2. The Court erred in not reversing the decree of the District Court of the United States for the Southern District of New York, made and entered on November 21, 1919, granting the libellant a decree on the pleadings.

3. The Court erred in holding that the property proceeded against in this cause was property which the libellant as Alien Property Custodian, pursuant to the authority vested in him as such official, had after investigation determined to belong to and to be held for, by, on account of and for the benefit of the Mannheim Insurance Company.

4. The Court erred in failing to rule that the property proceeded against in this cause was not property owing or belonging to or held for, by, on account of or on behalf of or for the benefit of the Mannheim Insurance Company.

5. The Court erred in failing to rule that the determination of the libelant as Alien Property Custodian that the property proceeded against in this cause belonged to and was held for, by, on account of or for the benefit of the Mannheim Insurance Company was not made after investigation and was not a determination which the Alien Property Custodian was authorized by the Trading with the Enemy Act or by the Executive Proclamations issued pursuant thereto to make.

6. The Court erred in failing to rule that the determination of the Alien Property Custodian that the property proceeded against in this cause belonged to and was held for, by, on account of or for the

benefit of the Mannheim Insurance Company was not made after investigation and was arbitrary and without authority of law.

7. The Court erred in failing to rule that the Claimant herein holds a lawful mortgage, pledge, lien or other right in the nature of security in the property proceeded against in this cause to secure the payment of creditors and policyholders of the Mannheim Insurance Company and is expressly authorized by the terms of the Trading with the Enemy Act to continue to hold said property.

8. The Court erred in failing to rule that the claimant holds the property proceeded against in this cause as Trustee of the trusts for the benefit of the policyholders and creditors of the Mannheim Insurance Company in the United States set out in the Indenture of Trust annexed to and made a part of the answer and the instruments supplemental thereto and that the claimant as such Trustee is entitled to hold possession of said property until said trusts are fully performed.

9. The Court erred in ruling that the Alien Property Custodian was authorized by the Trading with the Enemy Act to require delivery to him or to take possession of the property proceeded against in this cause notwithstanding the rights and interests therein of the claimant and the creditors and policyholders of the Mannheim Insurance Company in the United States.

10. The Court erred in failing to rule that the Trading with the Enemy Act could not authorize the Alien Property Custodian to take possession of the property proceeded against in this cause without contravening the provisions of the Fifth Amendment of the Constitution of the United States declaring that no person shall be deprived of property without due process of law.

11. The Court erred in that it ordered, adjudged and decreed that the libelant herein have judgment awarding to him the possession of the property proceeded against in this cause and that the United States Marshal of the Southern District of New York deliver to said libelant as Alien Property Custodian the said property and that the libelant have judgment for his costs.

12. The Court erred in that it did not order, adjudge and decree that the libel of information be dismissed with costs and did not provide and direct the United States Marshal for the Southern District of New York to restore the property proceeded against in this cause to the possession of the claimant.

Dated, New York, May 26th, 1920.

CARTER, LEDYARD & MILBURN,
Proctors for Claimant.

[Endorsed:] District Court of the U. S. for the Southern District of N. Y. Francis P. Garvan as Alien Property Custodian, Libelant and Appellee, against One Hundred Thousand Dollars par value Interborough Rapid Transit 5% Bonds, etc. Copy. Assignment of errors. Carter, Ledyard & Milburn, Proctors for Claimant. 54 Wall Street, Borough of Manhattan, New York City. Filed June 1, 1920.

Supreme Court of the United States for the Southern District of New York, in the Second Circuit.

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, Trustee under a Certain Indenture of Trust Made the 23rd Day of March, 1891, Plaintiff-in-error,

vs.

FRANCIS P. GARVAN, as Alien Property Custodian, Defendant-in-error.

Bond for Damages and Costs.

Know all Men by these Presents: That we Metropolitan Trust Company of the City of New York, Trustee, under a certain Indenture of Trust made the 23rd day of March, 1891, as Principal, and the United States Fidelity and Guaranty Company, having an office and usual place of business at No. 47 Cedar Street, in the City of New York, County and State of New York, as Surety, are held and firmly bound unto the above named Francis P. Garvan, as Alien Property Custodian, in the sum of two hundred and fifty ($250.00) dollars, to be paid to the said Francis P. Garvan, as Alien Property Custodian, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, representatives, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 26th day of May, 1920.

Whereas, the above named Metropolitan Trust Company of the City of New York, Trustee, under a certain Indenture of Trust made the 23rd day of March, 1891, has prosecuted a writ of error to the United States Circuit Court of Appeals for the Second Circuit, to reverse the order and decree dated the 29th day of March, 1920, rendered in the above entitled suit, in the United States Circuit Court of Appeals for the second circuit.

Now, Therefore, the condition of this obligation is such, that if the above named Metropolitan Trust Company of the City of New York, Trustee, under a certain Indenture of Trust made the 23rd day of March, 1891, shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK. [L. S.]
By J. A. McNAMARA, *Vice-President.* [L. S.]

Attest:
W. E. McHAY,
A. Secretary.

[SEAL.] UNITED STATES FIDELITY AND GUARANTY COMPANY.
By ADOLPHUS A. JACKSON, *Attorney-in-fact.*

Attest:
WILLIAM H. ESTWICK,
Attorney-in-fact.

STATE OF NEW YORK,
County of New York, ss:

On this 26th day of May, 1920, before me personally came Adolphus A. Jackson, known to me to be the Attorney-in-fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Metropolitan Trust Company of the City of New York, as surety thereon, who being by me duly sworn, deposes and says, that he resides in the City of New York, State of New York, and that he is the Attorney-in-fact of the said United States Fidelity and Guaranty Company; and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Metropolitan Trust Company of the City of New York is the corporate seal of the said United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Attorney-in-fact of said Company; and that he is acquainted with William H. Estwick and knows him to be the Attorney-in-fact of said Company; and that the signature of said William H. Estwick subscribed to said bond is in the genuine handwriting of said William H. Estwick and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unincumbered and liable to execution, exceed its claims, debts, and liabilities, of every nature whatsoever, by more than the sum of two million dollars ($2,000,000.00).

ADOLPHUS A. JACKSON.

Sworn to, acknowledged before me, and subscribed in my presence this 26th day of May, 1920.

J. W. MILLER,
Notary Public, New York County, No. 280,
Register No. 2328.

Certificate filed in Kings County, No. 138, Register No. 2173.
Bronx County, No. 25, Register No. 2206.
Queens County, No. 1975, Putnam, Westchester, Orange, Suffolk, Nassau, Richmond, Rockland.
Term expires March 30th, 1922.

STATE OF NEW YORK,
County of New York, ss:

On this 27th day of May, 1920, before me came James F. McNamara, to me known, who, being by me duly sworn, did depose and say that he resides in the Borough of Queens, N. Y., and that he is a vice-president of Metropolitan Trust Company of the City of New

York, the corporation described in and which executed the other instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is the just corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

A. E. FOWLER,
Notary Public, Kings Co., N. Y.,
No. 20, Reg. No. 2017.

Certificates filed in New York Co., N. Y., No. 18, Reg. No. 2008.
Queens Co., N. Y. No. 964.
Commission expires March 30, 1922.

[Endorsed:] District Court of the United States for the Southern District of New York. Metropolitan Trust Company of the City of New York, Trustee, under a certain Indenture made the 23rd day of March, 1891, Plaintiff, against Francis P. Garvan, as Alien Property Custodian, Defendant. Bond for damages and costs. Surety: United States Fidelity and Guaranty Company, 47 Cedar Street, New York. Bond approved. H. G. Ward, U. S. C. J., May 28, '20. Filed June 1, 1920.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 75 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Francis P. Garvan, as Alien Property Custodian, against $100,000 Par Value Interborough Rapid Transit 5% Bonds, etc., as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 2d day of June, in the year of our Lord One Thousand Nine Hundred and twenty and of the Independence of the said United States the One Hundred and forty-fourth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

Supreme Court of the United States.

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, Trustee under a Certain Indenture of Trust Made the 23rd Day of March, 1891, Plaintiff-in-error,

against

FRANCIS P. GARVAN, as Alien Property Custodian, Defendant-in-error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of Appeals of the United States for the Second Circuit, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the United States Circuit Court of Appeals before you, or some of you, in an action entitled Francis P. Garvan as Alien Property Custodian against One Hundred Thousand Dollars par value Interborough Rapid Transit Five Percent Bonds maturing in 1966 and other property, between Francis P. Garvan as Alien Property Custodian, Libellant-Appellee and Metropolitan Trust Company of the City of New York, Trustee under a certain Indenture of Trust made the 23rd day of March, 1891, Claimant-Appellant, a manifest error hath happened, to the great damage of the said Metropolitan Trust Company of the City of New York, Trustee, as is said and appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court ,to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, this 28th day of May in the year of our Lord One thousand Nine hundred and Twenty, and of the Independence of the United States the One hundred and forty-fourth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Endorsed:] Supreme Court of the United States. Metropolitan Trust Company of the City of New York, etc., Plaintiff in Error, against Francis P. Garvan as Alien Property Custodian, Defendant in Error. Writ of Error. Carter, Ledyard & Milburn, Attorneys for Plaintiff in Error, 54 Wall Street, Borough of Manhattan, New York City.

Due service of a copy of the within is admitted this 1st day of June, 1920.

FRANCIS G. CAFFEY, *U. S. Att'y.*

[Stamped:] United States Circuit Court of Appeals, Second Circuit. Filed Jun- 1, 1920. William Parkin, Clerk.

Supreme Court of the United States.

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, Trustee under a Certain Indenture of Trust Made the 23rd Day of March, 1891, Plaintiff in Error,

against

FRANCIS P. GARVIN as Alien Property Custodian, Defendant in Error.

Citation.

By the Honorable One of the Judges of the United States Circuit Court of Appeals for the Second Circuit to Francis P. Garvan as Alien Property Custodian, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held in the City of Washington, District of Columbia, on or before the 26 day of June, A. D. 1920, pursuant to an order allowing a writ of error, filed and entered in the Clerk's office of the United States Circuit Court of Appeals for the Second Circuit, to review an order for mandate, signed, filed and entered on the 29th day of March, 1920, in that certain suit entitled Garvan vs. $100,000 par value bonds, etc., wherein Metropolitan Trust Company of the City of New York, Trustee under a certain indenture of Trust, is Claimant-Appellant and you are Libellant-Appellee, to show cause, if any they be, why the order and decree rendered against the said Claimant-Appellant as in said order allowing a writ of error mentioned, should not be corrected, and why justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the Southern District of New York, Second Circuit, this 28 day of May, in the year of our Lord One thousand Nine hundred and Twenty, and of the Independence of the United States the One hundred and forty-fourth.

H. G. WARD,
Judge of the United States Circuit Court of Appeals for the Second Circuit.

[Endorsed:] Supreme Court of the U. S. Metropolitan Trust Company of the City of New York, Trustee, etc., Plaintiff in Error, against Francis P. Garvan as Alien Property Custodian, Defendant in Error. Citation. Carter, Ledyard & Milburn, Attorneys for Plaintiff in Error, 54 Wall Street, Borough of Manhattan, New York City.

Due service of a copy of the within is admitted this 1st day of June, 1920.

FRANCIS G. CAFFEY,
U. S. Att'y.

[Stamped:] United States Circuit Court of Appeals, Second Circuit. Filed Jun. 1, 1920. William Parkin, Clerk.

[In pencil:] Left by Mr. Smith of Carter, Ledyard & Milburn, 54 Wall St.

Endorsed on cover: File No. 27,753. U. S. Circuit Court Appeals, 2d Circuit. Term No. 396. Metropolitan Trust Company of the City of New York, Trustee, &c., plaintiff in error, vs. Francis P. Garvan as Alien Property Custodian. Filed June 14th, 1920. File No. 27,753.

FILED
DEC 27
JAMES D. MAHER,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 355.

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, TRUSTEE,

Plaintiff-in-Error,

against

FRANCIS P. GARVAN, AS ALIEN PROPERTY CUSTODIAN,

Defendant-in-Error.

BRIEF FOR METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, TRUSTEE, PLAINTIFF-IN-ERROR.

WALTER P. TAYLOR,

Counsel.

INDEX.

	PAGE
Statement	1
Allegations of the Libel	2
Allegations of the Answer	2-5
Provisions of the Trust Agreement	5-8
Specification of Errors	8
Summary of Points	10
POINT I	11
Cause to be Determined on the Merits. Contention of Government.	
Right of Alien Property Custodian must be based on facts and not merely on findings	11-*a*
Trading with the Enemy Act takes away remedies not rights	13-*b*
When Alien Property Custodian brings case into court, all matters are for court's determination	14-*c*
Trading with the Enemy Act does not make findings or determinations of the Alien Property Custodian conclusive, subject to review only in the manner prescribed in Section 9	15-*d*
The finding of the Alien Property Custodian being based on undisputed facts and contrary to law, was without authority in law	16-*e*
POINT II	17
Property was held under valid trust.	
POINT III	19
Alien Property Custodian cannot seize a fund held in trust by a citizen primarily for the benefit of other citizens.	
POINT IV	21
As Metropolitan Trust Company has the right to the property, the Court will not award possession to the Alien Property Custodian.	

TABLE OF CASES.

	PAGE
Brackett *v.* Middlesex Banking Co., 89 Conn. 645	18
Clinkenbeard *et al. v.* United States, 21 Wallace, 65	14, 22
Cooke *v.* Warner, 56 Conn. 234	18
DeLima *v.* Bidwell, 182 U. S. 1	16
Falkenbach *v.* Patterson, 43 Ohio, 359	18
Fassett, *Ite.* 142 U. S. 479	17
Gonzales *v.* Williams, 192 U. S. 1	16, 17
Imperial Insurance Co. *v.* Hambitzer, 95 Mich. 513	18
Lancashire Insurance Co. *v.* Maxwell, 131 N. Y. 286	18
Matter of Home Provident Safety Fund Assn., 129 N. Y. 288	18
People *ex rel.* Ruggles *v.* Chapman, 64 N. Y. 557	18
Ruggles *v.* Chapman, 59 N. Y. 163	18
United States *v.* Sherman, 237 U. S. 146	16
United States *v.* Sing Tuck, 194 U. S. 161	16
United States *v.* Tiffany & Co., 151 Fed. 473	16
Vandiver *v.* Federal Savings Bank, 120 Md. 619	18
Vandiver *v.* Poe, 119 Md. 348	18

Supreme Court of the United States.

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, Trustee, Plaintiff in Error, AGAINST FRANCIS P. GARVAN, as Alien Property Custodian, Defendant in Error.	October Term, 1920. No. 396.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

Plaintiff in error seeks to review the decision of the United States Circuit Court of Appeals for the Second Circuit affirming a decree of the United States District Court for the Southern District of New York. The proceeding in the District Court was a proceeding *in rem*. The decree of the District Court was entered upon the libel, notice of claim, and answer, and awarded to the libelant, who is the defendant in error here, possession of the bonds, stocks and other securities proceeded against, without prejudice to any claim that the claimant, plaintiff-in-error here, might file with the Alien Property Custodian under Section 9 of the Trading with the Enemy Act or to any suit that it might institute thereunder.

The proceeding was brought by the Alien Property Custodian, the defendant in error here, against securities having a face value of upwards of one million dollars, which, until seized by the marshal, were held by the Metropolitan Trust Company of the City of New York, the plaintiff in error, under an indenture executed in the year 1891 between the Mannheim Insurance Company and the Atlantic Trust Company (which was merged in the Metropolitan Trust Company in 1903), and instruments supplemental thereto. Metropolitan Trust Company of New York appeared and filed a claim and answer.

The Pleadings.

The libel alleged that the libelant did on or about April 15, 1919, after investigation determine that the Mannheim Insurance Company was an enemy not holding a license granted by the President and that the property described in Exhibit "A" annexed to the libel belonged to, and was held for, by, on account of, and for the benefit of the Mannheim Insurance Company, and further alleged that the libellant thereafter did require the Metropolitan Trust Company in whose possession, or under whose control said property then was, that said property be by it transferred, assigned, delivered and paid over to the libelant to be by him held, administered, and accounted for as provided by law; and that said requirement and demand was duly served on the Metropolitan Trust Company, and that the Metropolitan Trust Company failed to comply therewith.

The answer after formally admitting or denying each of the allegations of the libel sets out that the Mannheim Insurance Company was in 1891 and has since been a corporation organized under the

laws of Baden and engaged in the business of marine insurance, and that on the 23rd day of March, 1891, the Mannheim Insurance Company and the Atlantic Trust Company executed an indenture, of which a copy is annexed, whereby the Mannheim Insurance Company transferred to the Atlantic Trust Company the property therein described in trust for the uses and purposes therein set forth, and that subsequently by supplemental agreements the Mannheim Insurance Company transferred to the Atlantic Trust Company other properties and securities to be held upon the same trusts and for the same purposes; that in 1903 the Atlantic Trust Company was merged into the Metropolitan Trust Company and that thereafter the Mannheim Insurance Company and the Metropolitan Trust Company executed further instruments supplemental to the original indenture transferring additional securities and properties to be held upon the trust therein set out; that all the property proceeded against in the libel was at all the times mentioned in the libel held by the Metropolitan Trust Company under the indenture of trust and the instruments supplemental thereto; that the Metropolitan Trust Company is a corporation organized under the laws of the State of New York and is not an enemy or ally of an enemy and has not been found to be an enemy or ally of enemy by the Alien Property Custodian; that the Mannheim Insurance Company until subsequent to the beginning of the war between the United States and the German Empire was engaged in the business of marine insurance in New York, and Massachusetts, and elsewhere in the United States and had issued its policies in large amounts to citizens and residents of the United States, and that at the time of the outbreak of the war it had

outstanding policies of very large amounts held by citizens and residents of the United States and still has outstanding policies held by such citizens and residents; and that at all the times mentioned in the libel liabilities existed against it and still exist for very large amounts in favor of policy-holders in states, commonwealths, districts and territories of the United States; that such policy-holders were not and are not now enemies or allies of an enemy and have never been found to be enemies or allies of enemies by the Alien Property Custodian; that no certificate in writing has been signed by the Insurance Commissioner of Massachusetts stating that any portion of the property and securities against which this proceeding has been instituted is no longer needed for the purposes of the trust set out in the indenture above referred to and instruments supplemental thereto and that so far as the claimant is informed all of such property and securities are needed for the purposes of the trust; that the claimant has not been paid the commissions and compensation to which it is lawfully entitled as trustee of the trust upon which the property and securities in question are held and that it is entitled to the possession of said property not only for the purpose of carrying out said trusts and to secure to the beneficiaries thereof payment of the amounts due or to become due to them in accordance with the terms of such trust but also until all the commissions and compensation lawfully due it have been ascertained and paid and to secure the payment thereof; that the libellant made his so-called determination that the securities and property proceeded against are the property of an enemy with full knowledge of all the facts set forth in the answer and not as the result of any investigation into other or further facts,

and based his so-called determination solely upon the ground that notwithstanding the facts set forth in the answer he was entitled as a matter of right to take possession of the property and securities in disregard of the title of the claimant thereto as trustee of the trust described in the answer.

The answer prayed that the libel be dismissed and that the order theretofore made in the proceeding directing the marshal to seize and take possession of the securities and property be vacated, and that an order be entered restoring such securities and property to the possession of the Metropolitan Trust Company.

The Trust Instrument.

The indenture of which a copy is annexed to the answer and made a part thereof is dated March 23, 1891. It recites that the party of the first part (Mannheim Insurance Company) desires to establish a special fund of assets in the United States in the present sum of Fifty Thousand Dollars in trust for the benefit and security of all of the policy holders of the party of the first part in the United States and separate and distinct from the deposits required from it or which might thereafter be required from it for similar purposes to be made with the treasurer or with the superintendent of the insurance department or with other designated officials of any state, commonwealth, district or territory. By its terms the party of the first part (the Mannheim Insurance Company) sets over and transfer to the Atlantic Trust Company the securities therein mentioned to hold the same and such other funds as may be thereafter added thereto "for the purposes hereinafter stated and upon the trusts, covenants, agreements and provisions hereinafter declared and set forth." It is

provided that the Trust Company shall "receive, hold, possess and preserve" the property transferred to it and such other funds as may thereafter be transferred for the purpose of complying with and satisfying the provisions of the general laws and lawful governmental regulations of any state, commonwealth, district or territory of the United States wherein the party of the first part may do business and "for the further purpose of fully securing at all times all liabilities which may exist against the party of the first part in favor of policy holders in any state, commonwealth, district or territory of the United States during the existence of these presents or of the trust hereby created." The Trust Company is to collect the income which may accrue on the securities and pay it over to the Mannheim Insurance Company. Subject to the direction of the Insurance Company the Trust Company is authorized and required to sell or collect any property or security for the time being forming part of or representing the trust fund and to invest and reinvest the proceeds of such sale and it is authorized with the consent of the Insurance Company to make all necessary sales, conveyances, assignments, etc. The rights of policy holders and holders of other liabilities against the Mannheim Insurance Company are defined as follows:

> "Fifth: If at any time debts and liabilities for the security of which this trust was created shall become due and payable by the party of the first part, and shall not be otherwise satisfied and paid by the party of the first part, the party of the second part is authorized, empowered and required to appropriate so much of the said trust property as may be necessary for the payment and satisfaction thereof, and for that purpose may sell, assign, convey and transfer so much of said property and estate

held by them under these presents as may be necessary therefor without the previous consent of the party of the first part; but no alleged debt or liability shall be so paid or satisfied, nor shall the party of the second part sell or dispose of any portion of said property and estate held by them under the provisions of these presents for the purpose of satisfying the same, unless and until the amount and validity of said alleged debt or liability in each case shall have been admitted by the party of the first part and evidence thereof in writing shall have been produced to the party of the second part, or until the validity and amount of such alleged debt or liability shall have been established by the claimant in due course of law; and due notice of all such payments by the party of the second part shall be given by the party of the second part to the Insurance Commissioner of the Commonwealth of Massachusetts and to the like official of any other state, commonwealth, district or territory of the said United States which may, by notice from such official or from the party of the first part to the party of the second part be designated as one requiring notice of such payment."

The Insurance Company is authorized to increase or diminish the amount of the trust fund by adding further funds thereto or withdrawing funds therefrom "provided, however, that no portion of the said fund or of any of the property held by the party of the second part shall be by it surrendered to the party of the first part unless a certificate in writing be first signed by the Insurance Commissioner of the Commonwealth of Massachusetts * * * stating what portion of said funds is no longer needed for the purposes of the trust and the amount so surrendered by the party of the second part to the party of the first part shall not exceed the proportion so specified in such certificate." It

is declared that "subject to making due provisions for the purposes aforesaid and subject to the provisions hereinbefore contained" the Trust Company shall stand possessed of the trust fund at the control and subject to the order of the Insurance Company and shall use and dispose of the same as it may direct.

It is provided that the Trust Company may resign and that the Insurance Company shall have power at any time to remove the trustee. In case of resignation or removal the Insurance Company can appoint a successor trustee but only with the approval of the Insurance Commissioner of Massachusetts and no resignation or removal shall be effectual until a successor has been appointed and approved and has accepted the appointment.

The United States District Court and the United States Circuit Court of Appeals in disposing of this proceeding followed and reaffirmed the conclusions reached by those courts respectively in the similar cases now pending before this court and set down for argument at the same time as this case (see fol. 147 of record; see p. 60 of record).

Specification of Errors on Which Plaintiff in Error Intends to Rely.

The court erred in failing to rule that the property proceeded against in this cause was not property owing or belonging to or held for, by, on account of or on behalf of or for the benefit of the Mannheim Insurance Company.

The court erred in failing to rule that the claimant holds the property proceeded against in this cause as trustee of the trusts for the benefit of the policyholders and creditors of the Mannheim Insur-

ance Company in the United States set out in the Indenture of Trust annexed to and made a part of the answer and the instruments supplemental thereto and that the claimant as such trustee is entitled to hold possession of said property until said trusts are fully performed.

The court erred in ruling that the Alien Property Custodian was authorized by the Trading with the Enemy Act to require delivery to him or to take possession of the property proceeded against in this cause notwithstanding the rights and interests therein of the claimant and the creditors and policyholders of the Mannheim Insurance Company in the United States.

POINTS

The argument is stated in very summary form to avoid restating matters fully dealt with in the briefs submitted by plaintiffs in error in the other causes to which the Alien Property Custodian is a party which have been set down for argument with this cause.

POINT I

To entitle libelant, who is here the defendant in error, to a decree on the pleadings awarding him possession of the property against which his libel was filed, the pleadings would have to show that the property in fact belonged to or was held for account of an enemy or ally of an enemy.

POINT II

The property against which the libel was filed was held by the Metropolitan Trust Company of the City of New York, the plaintiff in error, primarily for the benefit of creditors and policyholders of the Mannheim Insurance Company within the United States.

POINT III

The Trading with the Enemy Act does not authorize the Alien Property Custodian to seize a fund as belonging to an alien enemy in disregard of the superior rights therein held by a citizen and resident of the United States for the benefit of other citizens and residents.

POINT IV.

Inasmuch as the pleadings show that the Metropolitan Trust Company has the right to the property, possession of it should not be awarded to the Alien Property Custodian by the Court, even if he were authorized by the terms of the Trading with the Enemy Act to seize it.

POINT I.

To entitle the libelant, who is here the defendant in error, to a decree on the pleadings awarding him possession of the property against which his libel was filed, the pleadings would have to show that the property in fact belonged to or was held for account of an enemy or an ally of an enemy.

The libel (see fol. 17) does not allege that the property proceeded against belonged to the Mannheim Insurance Company or was held for its account, but alleges only that the Alien Property Custodian so determined (fol. 17). The answer sets out facts from which, according to the contention of the plaintiff in error, it follows as a matter of law that the property in question did not belong to the Mannheim Insurance Company but to citizens and residents of the United States. The contention of the Government, in effect, is that the determination of the Alien Property Custodian that the property belongs to an alien enemy, and his demand for its possession, establish his right to a decree notwithstanding any facts that may be shown as to actual ownership.

(*a*) The right of the Alien Property Custodian to the possession of property under the Trading with the Enemy Act must be predicated upon the fact that the property is enemy property and not merely upon the finding of the President, or the Alien Property Custodian as his representative, to that effect.

Section 7, Subdivision *c*, of the Trading with the Enemy Act, as originally enacted, provided:

> "If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of an enemy not holding a license granted by the President hereunder, which the President, after investigation, shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian."

Section 7, Subdivision *c*, was amended November 4, 1918, to read as follows:

> "If the President shall so require any money or other property, including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade-marks, choses in action and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President, after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered, and disposed of as elsewhere provided in this Act."

The language of Section 7, Subdivision *c*, both in its original form and as amended, shows that two things must concur in order to make effective the requirement of the President or the Alien Property Custodian that money or other property shall be

transferred or paid over to the Alien Property Custodian. The property or money must be owing to or belong to or be held for an enemy or ally of an enemy, and the President, after investigation, must determine that it is so owing or so belongs or is so held. There is no basis in the language of the Act for the contention that the property which it requires to be delivered or paid over to the Custodian is all property which the President, after investigation, determines is enemy-owned. The fact must exist as well as the finding of fact.

(*b*) The Trading with the Enemy Act, in that it provides (Section 7, Subdivision *c* as amended November 4, 1918), that "the sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act", limits the remedy of one not an enemy whose property is delivered to the Alien Property Custodian or seized by him or demanded by him from some third person having it in his custody, but it does not take away the right of the non-enemy owner to the property or his right to retain possession of it. If one not an enemy or ally of an enemy refuses to deliver possession of property which he claims as his own, he acts at his peril if in fact his claim be unfounded, but if his claim be well founded he is within his right and none of the penalties of the Act apply to him. The seizure by the Alien Property Custodian of property which in fact is not the property of an alien enemy or ally of an enemy is none the less illegal because the Alien Property Custodian is protected by the statute.

(c) When, as in the present case, the Alien Property Custodian comes into court and asks the court to enforce his claim to the possession of property, he must establish the facts which show his right to such possession, that is to say, he must show not only that the property he demands has been found to be enemy property but that it is enemy property. His position is in all respects similar to that of the government when it goes into court to maintain a suit for the collection of a tax. The taxpayer may set up any defense he has, though if the tax has been paid and the taxpayer seeks to recover it, he is limited to the remedies expressly given by law.

In *Clinkenbeard et al.* v. *United States*, 21 Wallace, 65, the government brought suit to recover the amount of a tax assessed against a distiller who in defense set up facts showing that the tax was not due and that the assessment ought not to have been made. Counsel for the government raised the point that the assessment not having been appealed from was *res adjudicata* and conclusive and that the defendant was precluded from showing anything to the contrary. Bradley, *J.*, said (p. 70):

> "It is true that the Internal Revenue Act of 1864 authorizes the Commissioner of Internal Revenue, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected and the Amended Act of July 13, 1866, declares that no suit shall be maintained for the recovery of any tax alleged to have been erroneously or illegally assessed or collected until such appeal shall have been made, and a decision had. The suit thus prohibited is a suit brought by the person taxed to recover back a tax illegally assessed and collected. This differs from the case now under consideration, which is a suit brought by the government for collecting the tax, and

the person taxed (together with his sureties) is defendant instead of plaintiff. No statute is cited to show that he cannot, when thus sued, set up the defense that the tax was illegally assessed, although he may not have appealed to the commissioner.

Is he precluded by any general rule of law from setting up any such defense? Has an assessment of a tax so far the force and effect of a judicial sentence that it cannot be attacked collaterally, but only by some direct proceeding, such as an appeal or *certiorari* for setting it aside?

It is undoubtedly true that the decisions of an assessor or Board of Assessors, like those of all other administrative commissioners, are of a *quasi judicial* character, and cannot be questioned collaterally when made within the scope of their jurisdiction. But if they assess persons, property, or operations not taxable, such assessment is illegal and cannot form the basis of an action at law for the collection of the tax, however efficacious it may be for the protection of ministerial officers charged with the duty of actual collection by virtue of a regular warrant or authority therefor. When the government elects to resort to the aid of the courts, it must abide by the legality of the tax. When it follows the statute its officers have the protection of the statute and parties must comply with the requirements thereof before they can prosecute as plaintiffs."

(*d*) The Trading with the Enemy Act does not purport to make the finding of the President or of the Alien Property Custodian that property is enemy property final and conclusive unless and until the property has been surrendered and the finding reviewed as provided in Section 9, nor does the act purport to make the President or the Alien Property Custodian an exclusive tribunal for the determination of the question of enemy or non-

enemy ownership. If the provisions of the act had been intended to have any such meaning they would have been appropriately framed after the analogy of the Customs Administrative Act, the Contract Labor Law and similar statutes. See *United States* v. *Tiffany & Co.*, 151 Fed. 473; *Gonzales* v. *Williams*, 192 U. S. 1; *United States* v. *Sing Tuck*, 194 U. S. 161.

A statute will not be construed to make the finding of an administrative officer final and conclusive unless the legislative intention to that effect is clearly and unmistakably expressed.

United States v. *Sherman*, 237 U. S. 146.

There is nothing in the act which denies to the owner of property for which the Alien Property Custodian has made demand the right to set up any facts which in law constitute a defense to the demand and the appropriate if not the only way for such non-enemy owner to assert his rights is to refuse to make delivery and to stand upon his title.

(*e*) Even if the Trading With the Enemy Act purported to make the finding of the President or of the Alien Property Custodian upon the ownership of property conclusive unless the property be surrendered and the finding reviewed as provided in Section 9, the Alien Property Custodian could not sustain an action for the recovery of property upon a finding that it was enemy owned based on undisputed facts showing conclusively that it was owned by a non-enemy. Such a finding would be without jurisdiction and of no effect. The true owner would not be obliged to follow the statutory procedure in order to review it. *Gonzales* v. *Williams*, 192 U. S. 1; *De Lima* v. *Bidwell*, 182

U. S. 1. In *Gonzales* v. *Williams* the Commissioner on undisputed evidence showing that Gonzales was a resident of Porto Rico held that she was an alien immigrant. Chief Justice Fuller in referring to the *De Lima* case and the case in *Re Fassett*, 142 U. S. 479, said, "And in the present case as Gonzales did not come within the Act of 1891 the commissioner had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary; she was not obliged to resort to the Superintendent or the Secretary."

POINT II.

The property against which the libel is filed was held by the Metropolitan Trust Company of the City of New York primarily for the benefit of creditors and policyholders of the Mannheim Insurance Company within the United States.

The question whether the property against which the libel is filed is held in trust by the Metropolitan Trust Company for the benefit of the creditors and policyholders of the Mannheim Insurance Company in the United States or is held for the benefit of the Mannheim Insurance Company an alien enemy is to be determined solely by the terms of the trust instrument which is clear and unambiguous and defines fully and clearly the rights of the parties. It doubtless is the fact that it was executed and the trust set up in order to comply with statutory requirements of the State

of Massachusetts but it does not concern us to know what those requirements are. The duties of the Trustee and the rights of the beneficiaries of the trust are defined not by the statute but by the instrument.

That the Trust Instrument creates a trust for the benefit primarily of the creditors and policy-holders of the Mannheim Insurance Company in the United States is hardly open to serious question.

Cooke vs. *Warner,* 56 Conn. 234;

Brackett vs. *Middlesex Banking Co.,* 89 Conn. 645;

Lancashire Insurance Co. vs. *Maxwell,* 131 N. Y. 286;

Matter of Home Provident Safety Fund Assn., 129 N. Y. 288;

Ruggles vs. *Chapman,* 59 N. Y. 163;

People ex rel. Ruggles vs. *Chapman,* 64 N. Y. 557;

Vandiver vs. *Poe,* 119 Md. 348;

Vandiver vs. *Federal Savings Bank,* 120 Md. 619;

Imperial Insurance Company vs. *Hambitzer,* 95 Mich. 513;

Falkenbach vs. *Patterson,* 43 Ohio, 359.

POINT III.

The Trading with the Enemy Act does not authorize the Alien Property Custodian to seize a fund as belonging to an alien enemy in disregard of the superior rights therein held by a citizen and resident of the United States for the benefit of other citizens and residents.

The property which Section 7, Subdivision *c*, as amended, authorizes the Alien Property Custodian to seize is "money or other property * * * choses in action and rights and claims of every character and description, *owing or belonging to or held for, by, on account of or on behalf of or for the benefit of an enemy or ally of an enemy.*" There is nothing here that authorizes the Alien Property Custodian to seize or take possession of property held by a citizen and resident for the benefit of other citizens and residents. The fact that an alien enemy has an interest in the property subject to the rights of citizens and residents may authorize the Alien Property Custodian by appropriate action to take the right, title and interest of the alien enemy, but does not authorize him to seize the property itself. The Amendment of November 4, 1918, to Section 7 of the Act was intended to meet just such a case by providing that a requirement made by the Alien Property Custodian pursuant to the Act might be filed, registered or recorded and if so filed, registered or recorded should have the same force and effect as a duly

executed conveyance, transfer or assignment to the Alien Property Custodian.

It has been suggested that the right to seize property in which an alien enemy has an interest in disregard of the rights of lienors and their trustee (which cannot be spelled out of Section 7 (*c*)) is to be found in Section 8 (*a*).

Section 8(*a*) does not purport to confer any power of seizure upon the President or the Alien Property Custodian or to enlarge or modify the provisions of Section 7(*c*). It deals with a different matter. The only theory upon which it can be resorted to for the purpose of determining the scope of the Alien Property Custodian's power to seize is that Section 7(*c*) is ambiguous and that Section 8(*a*) throws light upon the sense in which the ambiguous terms are used in Section 7(*c*). If Section 7(*c*) is not ambiguous then there is no basis for enlarging its scope by reference to Section 8(*a*). It is submitted that Section 7(*c*) is not ambiguous but defines the power of the Alien Property Custodian with sufficient precision to make unjustifiable the resort to other sections of the Act for the purpose of ascertaining the scope of that power.

POINT IV.

Inasmuch as the pleadings show that the Metropolitan Trust Company has the right to the property, possession of it should not be awarded to the Alien Property Custodian by the Court, even if he were authorized by the terms of the Trading with the Enemy Act to seize it.

Even if the Trading with the Enemy Act authorizes the Alien Property Custodian to seize property held in trust by a citizen and resident of the United States primarily for the benefit of other citizens and residents merely because an alien enemy has an interest in the property subject to the rights of the citizens and residents of the United States, it nevertheless is certain that the Trading with the Enemy Act does not intend to deprive the citizens and residents of the United States of rights in property merely because of such a subordinate interest in an alien enemy. Either the Alien Property Custodian has no right in the first place to seize such property, or the citizens and residents interested therein have a right to have their interest protected in a proceeding brought under Section 9 of the Trading with the Enemy Act. Unless one of these alternatives is true, the Trading with the Enemy Act would deprive citizens of the United States of their property without due process of law in violation of the Fifth Amendment of the Constitution of the United States. But if the right of a citizen of the United States is such that he could, under a proceeding brought under Section 9 of the Trading with the

Enemy Act, recover possession of property seized by the Alien Property Custodian under Section 7(*c*), then it is submitted that his right constitutes a complete defense to a libel filed by the Alien Property Custodian to obtain possession of the property. The Alien Property Custodian is not obliged to come into court to assert his right of possession; but, if he does come into court, he must establish his right to the property upon the merits as against the claim of a citizen who is in possession of it.

Clinkenbeard et al. vs. *United States,* 21 Wallace 65.

The pleadings in the present case show the facts requisite to a decision on the merits of all questions as to the relative rights of the Alien Property Custodian and of the Metropolitan Trust Company. The parties here are the only parties necessary to the decision of those questions. If the Metropolitan Trust Company, upon the facts disclosed by the proceedings, would be entitled to recover the securities proceeded against from the Alien Property Custodian in a proceeding brought under Section 9 of the Trading with the Enemy Act, it should be allowed in this proceeding to retain the securities. The merits of the case should not be left to be determined in a new proceeding in the same court by the same parties and presenting the same facts. The Metropolitan Trust Company has a right to set up title to the property and to have the question of its right thereto determined on the merits.

It is submitted that there can be no question of the right upon the merits of the Metropolitan Trust Company to the securities proceeded against.

LAST POINT.

The decrees entered below should be reversed and the Marshal for the Southern District of New York should be directed to restore the property proceeded against in this cause to the possession of the Metropolitan Trust Company of the City of New York.

WALTER F. TAYLOR,
Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

METROPOLITAN TRUST COMPANY OF the City of New York, Trustee, Plaintiff in Error, v. FRANCIS P. GARVAN, as ALIEN PROPERTY Custodian, Defendant in Error.	No. 396.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

By the writ of error in this case the Metropolitan Trust Company of the City of New York, as trustee, seeks to review a decree of the United States Circuit Court of Appeals for the Second Circuit affirming a decree of the District Court for the Southern District of New York, awarding to the Alien Property Custodian possession of certain securities. These securities had been libeled by the Alien Property Custodian in a proceeding (analogous to an admiralty suit in rem) brought under the provisions of Section 17 of the Trading with the Enemy Act to enforce

compliance with a requirement or demand issued by the Alien Property Custodian under Section 7 (c) of said Act as amended.

The proceeding itself, the pleadings of the Custodian as libellant in the court below, and of the Trust Company as claimant, the decrees and opinions of the District Court and of the Circuit Court of Appeals, and the questions raised by the brief filed in this Court by the plaintiff in error, are all substantially identical with those in cases Nos. 394 and 395, pending in this Court, and which will be heard cotemporaneously with this case. Such differences as exist will be briefly discussed herein and shown to be immaterial. Consequently, the defendant in error adopts his brief in the two cases above mentioned (hereafter for convenience referred to as the "Munich cases") as his brief in this case, save in so far as is otherwise noted below.

The securities involved in this proceeding were deposited with the plaintiff in error by the Mannheim Insurance Company, and this case will for convenience be referred to hereafter as the "Mannheim case."

THE PLEADINGS.

The libel, while containing minor differences of verbiage, is identical in all material respects with those in the Munich cases.

The answer differs chiefly from that filed in the Munich case in its brevity. Like the answer last mentioned it relies upon the provisions of the trust deed under which the securities were delivered to the trustee as evidencing the interest of itself and the

nonenemy creditors and policyholders in the trust funds.

The following differences are worthy of brief comment:

1. The Mannheim answer, unlike the Munich answer, does not set up or rely expressly upon the statutes pursuant to which the deposit was made. This is of no importance, as such statutes could properly be considered in determining the purpose of the trust in any event.

2. The Mannheim answer expressly claims a possessory lien upon the securities for the claimant's own commissions and compensation as trustee. (Ans. Par. 13, p. 33.) This, too, is immaterial, for if, as the Custodian contends, policy holders and creditors are protected by Section 9 of the Trading with the Enemy Act, that Section likewise protects this trustee.

3. The Mannheim answer also asserts that no certificate has been made by the Insurance Commissioner of Massachusetts, stating that the securities are no longer needed for the purposes of the deed of trust. (Par. 12, p. 33.) This difference also is of no moment, because the answers in the Munich cases asserted the existence of outstanding claims and obligations, the truth of which allegation, if material, would have been admitted by the Custodian's motion for judgment on the pleadings.

Apparently the plaintiff in error shares our opinion as to the substantial identity of its answer with the Munich answers, for no attempt has been made to differentiate them in its brief.

THE DEED OF TRUST.

The differences in the deeds of trust upon analysis are found to be differences of form and not of substance. On page 47 of the Custodian's brief in the Munich case is an analysis of the salient provisions of that deed of trust and it is apparent on inspection that the trust deed in this case (pp. 36–43 inclusive) under slightly altered verbiage, carries the same provisions for the benefit of the enemy insurance company. The trustee must render its account to the company (par. 2); must obtain the company's consent for investments and reinvestments (par. 3); must pay over all income to the company (par. 2). The company also retains the privilege of filling all vacancies in the trusteeship and may without assigning any cause remove the trustee at pleasure (par. 8). Debts and liabilities of the company may be satisfied by the trustee only upon written consent of the company or pursuant to judgment of court (par. 5), and, subject to the provisions of the trust, the trustee stands possessed of the securities at the control and subject to the order of the company (par. 7).

Unlike the Munich deed of trust this deed contains no opening provision that the trustee shall receive, hold, possess, and keep all assets and property delivered by the company to be held in trust for the company, but this is fully covered by the provisions of the seventh paragraph as above noted. The company in this case does not reserve the right to withdraw the funds for the purpose of making deposits in other states as was done in the Munich case.

However, such deposits in other states, if made by the Munich company, would likewise stand under the laws of such states for the benefit of the creditors and policyholders in the United States, and this difference is likewise immaterial. The salient feature of both deeds of trust is that they constitute simply a means of retaining the securities in this country subject to the jurisdiction of American courts in any action brought by aggrieved policyholders and creditors, and that in all other respects the disposition, management, and control of the funds are left with the depositing insurance company.

CASES CITED BY PLAINTIFF IN ERROR.

There are a few decisions cited by our opponent which are not covered in the opposing brief in the Munich case, and these will be briefly discussed below.

DeLima v. *Bidwell*, 182 U. S. 1, is cited by the opposing brief, page 16, as showing that the Custodian's determination of enemy ownership is ineffectual if the undisputed facts show conclusively the contrary to be the case.

This was a suit brought against the Collector of the Port of New York to recover customs duties alleged to have been illegally exacted. The sole question decided by the majority opinion (pp. 174–200) was whether Porto Rico was foreign territory within the meaning of the tariff laws. If it was, the remedy by appeal to the Board of General Appraisers was final and exclusive. If not, then the goods were not "imported," the Collector was acting *ultra vires*, and the statutory limitation upon

the aggrieved party's remedy did not apply. The statute there in question covered only "imported merchandise" (p. 175) and lacked the sweeping terms of section 7 (c) of the Trading with the Enemy Act as amended (40 Stat. 1020) as to "the sole relief and remedy" of any person claiming an interest in any property conveyed, etc., or required so to be. Had the customs act contained a clause including merchandise which the collector asserted to be imported, the case would support the Trustee's contention here.

Further the act was not a war measure.

Gonzales v. *Williams*, 192 U. S. 1, though an immigration case is on all fours with *DeLima* v. *Bidwell, supra.* Our comments on that case will dispose likewise of this one.

United States v. *Tiffany & Co.*, 151 Fed. 473, cited by our opponents at page 16, so far as relevant at all, supports the Custodian's position here, as the exclusiveness of the remedy given by the Customs Act was squarely upheld.

United States v. *Sing Tuck*, 194 U. S. 161 (opposing brief p. 16), is also in our favor. The court held that even a person claiming American citizenship could not by asserting lack of jurisdiction in the immigration officials try out the merits at least until he had exhausted the statutory remedy by appeal to the Secretary of Commerce and Labor. The court said (p. 170):

> We are of the opinion that the attempt to disregard and override the provisions of the

statutes and rules of the department and to swamp the courts by a resort to them in the first instance must fail.

United States v. *Sherman, 237 U. S. 146.*—We have no quarrel with the principle of this case as cited by our opponents (p. 16). The Custodian's determination, as we have said in our brief in the Munich cases, is not final and conclusive, being subject to review under section 9.

Imperial Insurance Co. v. *Hambitzer, 95 Mich. 513.*—This case (opposing brief, p. 18) is wholly valueless as an aid to the construction of the deed of trust here involved, the effort to release the securities deposited with State officials being made by the depositing company itself, and not by an officer of the law claiming paramount right of possession.

CONCLUSION.

For the reasons given in our brief in the Munich case the decree of the Circuit Court of Appeals here complained of was correct and should be affirmed.

Respectfully submitted.

THOMAS J. SPELLACY,
Assistant Attorney General.
LUCIEN H. BOGGS,
Special Assistant to the Attorney General.
WILLIAM L. FRIERSON,
Solicitor General.

○